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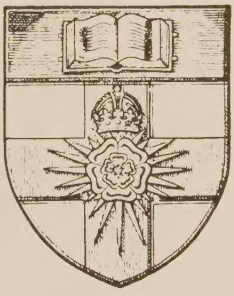

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THE

LAW REPORTS.

Courts of Probate and Divorce.

REPORTED BY,

RICHARD SEARLE, BARRISTER-AT-LAW,

AND

JOHN G. MIDDLETON, LL.D., ADVOCATE.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. III.

FROM MICHAELMAS TERM, 1872, TO TRINITY TERM, 1875.

BOTH INCLUSIVE.

XXXVI—XXXVIII VICTORIA.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

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OF

THE COURT OF PROBATE

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FOR

DIVORCE AND MATRIMONIAL CAUSES,

XXXVI—XXXVIII VICTORIA.

The Right Hon. Sir James Hannen, Knt.

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Y.

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CASES

DETERMINED BY THE

COURT OF PROBATE

AND BY THE COURT FOR

DIVORCE AND MATRIMONIAL CAUSES

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

MORRITT *v.* DOUGLAS.

1872
Dec. 10.

Will—Execution—Mark—Acknowledgment.

The evidence of one attesting witness (the other being dead) proved that he was called into the room of the deceased, and asked by a third party, who had the will in his hand at the time, to witness the signature of the deceased. A mark or cross was then on the paper at the foot of the will. The witnesses signed their names. The deceased was present, and within hearing, but did not make any observation, and the will was not read to or by him in the presence of the witnesses. The writer of the will, who had asked the witnesses to sign their names, was not called, and no proof was offered of his death :—

Held, that the evidence failed to prove that the deceased acknowledged his signature in the presence of witnesses.

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THE defendant, Mr. Douglas, propounded the will of Thomas Morritt. The plaintiff, John Morritt, pleaded that the will was not executed in accordance with the provisions of the statute, 1 Vict. c. 26, and that the deceased did not know or approve of the contents thereof. The only witness produced was Henry Parkinson, a labourer, who deposed that on the 9th of May, 1862, he was sent for to Mr. Douglas's house; that he there saw the deceased

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Thomas Morritt, Mr. Davis, George Robinson (the other witness), and Mr. and Mrs. Douglas. George Robinson has since died. That Davis said he wanted us (me and Robinson), to sign Thomas Morritt's will. Thomas Morritt heard what was said, for he sat near all along. The paper was not before the deceased. Davis had it in his hand. Davis said it was of no use reading over the will, to which Robinson assented. Davis left the room. We called him back to show us where to sign. We signed in the presence of Thomas Morritt. Thomas Morritt did not sign in our presence, but there was a mark on the paper. During the whole time the deceased said nothing. George Robinson asked the deceased how he was, but nothing was said about the will. I saw no signature or mark made. I do not think the deceased was exactly in his right mind. He knew what he was about. On cross-examination he said he saw the mark just above the witnesses' signatures, not any other.

Nov. 21. *G. H. Cooper*, for the defendant, contended that the observation of Davis in the presence of the deceased constituted an acknowledgment by the deceased, and that as he is admitted to have been competent, it must be presumed that he knew and approved of the contents of the paper.

Searle, for the plaintiff. In all the cases where acknowledgment is presumed from indirect evidence there has been a signature, and not merely a mark, by the testator. There is no evidence before the Court that the deceased ever expressed a testamentary intention in accordance with the terms of the will. He might have supposed, from what was said, that it was Davis's will that was being executed.

The cases cited were: *In the Goods of Summers* (1); *In the Goods of Bosanquet* (2); *In the Goods of Jones* (3); *Middlehurst* v. *Johnson* (4); *Cunliffe* v. *Cross* (5); *Hastilow* v. *Stobie* (6); *Goodacre* v. *Smith* (7); *Cleare* v. *Cleare* (8); *Atter* v. *Atkinson*. (9)

Cur. adv. vult.

(1) 2 Roberts, 295.
(2) 2 Roberts, 577.
(3) Deane, 3.
(4) 30 L. J. Rep. (P. M. & A.) 14.
(5) 3 Sw. & Tr. 37; 32 L. J. (P. M. & A.) 68.
(6) Law Rep. 1 P. & M. 64.
(7) Law Rep. 1 P. & M. 359.
(8) Law Rep. 1 P. & M. 655.
(9) Law Rep. 1 P. & M. 665.

(5) 3 Sw & Tr 210 (6) 1 Sw & Tr 36

Dec. 10. SIR J. HANNEN. The issues which I had to determine in this case were, first, whether the alleged will of Thomas Morritt, dated 9th of May, 1862, was duly executed; and, secondly, whether the deceased, at the time of the execution of the said alleged will, knew and approved of the contents thereof. The alleged will purported to be executed by the deceased by a mark. One attesting witness, Henry Parkinson, was called, who stated that upon going into the room where the deceased was, a person, named Thomas Davis, said to him and the other attesting witness that he wished them to sign Thomas Morritt's will. The witness, in answer to the question, "Did Thomas Morritt hear that?" said, "Yes, he sat close by." It is clear that the witness merely drew the inference that the deceased heard, from the fact that he was near. No other evidence was offered to connect the alleged will with the deceased. The mark, which is alleged to be that of the deceased, was already on the paper when the witnesses were called in; the will was not read to or by the deceased in their presence, nor was any allusion made to it by any one, beyond the words uttered by Davis; and the witness stated that he thought the deceased was not exactly in his right mind at the time. At the hearing, several cases were cited, which I have examined, but I do not think it necessary to comment on them, as they have not assisted me to come to a conclusion on the simple facts of the case. It is sufficient to say that the evidence entirely fails to satisfy the Court that the deceased either acknowledged the mark to be his, or that he knew what the contents of the alleged will were.

Attorney for plaintiff: *Learoyd.*
Attorney for defendant: *T. H. Smith.*

1872
Dec. 17.

MILLER *v.* JAMES AND OTHERS.

Testamentary Suit—Foreign Domicil—Probate issued under Law of Domicil, and unrevoked—Pleading—Practice.

If a will of the deceased has been formally recognized and acted upon by the Court of competent jurisdiction in the country of his domicil at the time of death, and remains unquestioned in that country, the Court of Probate will not allow the validity of such will to be litigated here.

AMELIA BELL, of St. Heliers, in the island of Jersey, spinster, died on the 20th of May, 1872, having executed a will dated 30th of August, 1870, in which she appointed David Miller, the plaintiff, sole executor and universal legatee. On the 30th of May, 1872, probate of this will was, by the authority of the Ecclesiastical Court of the Island of Jersey, granted to the said David Miller as the sole executor therein named, the said Court having competent jurisdiction, by reason that the testatrix was domiciled in the island at the time of her death. Application having been made in the Principal Registry for a grant of probate in respect of the property in this country, it was found that a caveat had been entered against such a grant by Francis James, the defendant, a nephew, and one of the next of kin of the deceased. The plaintiff thereupon filed a declaration, in which he stated that deceased at the time of her death was domiciled in the island of Jersey, that the will was duly executed in accordance with the laws of that island, and that after the death of the deceased, the Ecclesiastical Court of the island, being a court of competent jurisdiction, granted probate of the same to the plaintiff. The pleas filed by the defendants were, 1st, that the paper writing propounded was not duly executed in manner and form as in the declaration alleged; 2nd, that the deceased on the 30th of August, 1870, was not of sound mind, memory, and understanding; and 3rd, that the execution of such will was obtained by the undue influence of the plaintiff.

Nov. 26. *Searle* moved the Court to order that the second and third pleas be struck out. The Court of competent jurisdiction

having decided that the will had been duly executed, this Court ought to accept such decision, and not allow the question to be re-opened here. He referred to *Enohin* v. *Wylie* (1); *In the Goods of Earl* (2).

[SIR J. HANNEN. You contend that, although these matters were not raised before the Court of Jersey, they might be; and the proper course is to move that Court to revoke the probate on the ground of these objections.]

Inderwick, for the defendants, opposed the motion.

Cur. adv. vult.

Dec. 17. SIR J. HANNEN. In this case the plaintiff, executor of the will dated the 30th of August, 1870, of Amelia Bell the deceased in the cause, in his declaration alleged that the testatrix was at her death domiciled at Jersey, that by the law of Jersey the will in question was duly executed, and is a valid will, and was proved in a Court of competent jurisdiction in Jersey. The defendant has pleaded with another plea, (2) that the testatrix was not of sound mind, and (3) that the execution of the will was produced by undue influence. Application was made on behalf of the plaintiff to strike out these two pleas. I thought the question thus raised fitter to be determined on demurrer to the pleas, but as the parties desire for their guidance an expression of my opinion on the present motion, I now give it. It is the established practice that, where a will has been proved in a foreign court (and for this purpose the Court in Jersey is on the same footing as a foreign court), a duly authenticated copy will be admitted to probate in this country, without further evidence of the validity of the will, as it is presumed that the foreign Court has been satisfied on that point. In the case *In the Goods of Smith* (3) Lord Penzance said:—"It is a general rule, on which I have already acted, that when a person dies domiciled in a foreign country, and the Court of that country invests anybody, no matter whom, with the right to administer the estate, this Court ought to follow the grant, simply because it is the grant of a foreign court, without investigating the grounds on which it was made, and without

(1) 10 H. L. C. 1. (2) Law Rep. 1 P. & M. 450.
(3) 16 W. R. 1130.

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reference to the principles on which grants are made in this country." And in the case of *Enohin* v. *Wylie* (1) Lord Westbury (the Lord Chancellor) said:—"I hold it to be now put beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicil." And again, p. 15, "The utmost confusion must arise, if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next, of interpreting the will." It was said in argument that the validity of this will might be put in issue, because it had been proved only in common form in Jersey; but it is to be borne in mind that the expressions, "in common form," and "in solemn form," are not necessarily appropriate to a foreign probate, and the Court here is not entitled to take upon itself to determine whether the Court of the place of domicil has adopted sufficient means to investigate the validity of wills to which it has given its official sanction. For these reasons I am of opinion that the pleas objected to must be struck out, and the defendants must seek their remedy by application to the proper court, whatever that may be, having jurisdiction to revoke the probate which has been granted.

Proctors for plaintiff: *Toller & Sons.*
Proctors for defendant: *Lawrie, Keen & Rogers.*

(1) 10 H. L. C. at p. 13.

GODDARD *v.* SMITH. 1872

Citation to bring in Probate—Previous Caveat withdrawn before having been warned—No previous contentious Proceedings—Estoppel. Dec. 17.

A will of the deceased having been found in which A. was named executor, he gave notice thereof to B., who was about to obtain a grant in the goods of the deceased as interested under a previous will, and entered a caveat. Before the caveat had been warned, and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to B. that he did not intend to seek to establish his will, and administration, with the earlier will annexed, issued to B. Subsequently A. took out a citation calling upon B. to bring in the administration and shew cause why it should not be revoked:—

Held, that A. was not precluded from continuing a suit to determine which was the last will of the deceased.

WILLIAM GODDARD, late of Oldham Road, Newton Heath, Lancashire, died on the 16th of October, 1871, possessed of personal estate of the value of 1400*l.*, including a beershop and cottages at Newton Heath. On the 28th of October, 1871, administration, with a will annexed bearing date the 20th of February, 1870, of the goods of the deceased, was granted to the defendant, Joseph Smith, and Emma Molloy, two of the residuary legatees substituted in the said will. This grant was revoked on the 8th of November, 1871, on the application of Joseph Smith, and on the ground that Emma Molloy was a minor. On the 11th of November Arthur Goddard, the plaintiff, entered a caveat in the goods of the deceased, and on the 22nd of November, the caveat having been warned, appeared and filed an affidavit of scripts. On the 7th of December, 1871, a letter was addressed to Mr. Ayrton, the proctor for the defendant, by Messrs. Burchett, the then proctors for the plaintiff, informing him that the plaintiff did not intend to offer any further opposition to the will of the 20th of February, 1870, and proposed that administration, with that will annexed, should be granted to Arthur Goddard and his sister, Eliza Sewrey, wife of John Sewrey, jointly with Joseph Smith. This was agreed to on the part of Joseph Smith, but the arrangement was never carried out. On the 24th of January, 1872, Mr. Goddard's attorneys, Messrs. Brown & Son, communicated to the attorneys for Mr. Smith that a will of the deceased had been

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found, bearing date the 2nd of October, 1871, by which the deceased left the whole of his property to Arthur Goddard and Eliza Sewrey, and appointed Arthur Goddard sole executor. At the same time they entered a caveat, but before it was warned a further communication was made to the effect that Arthur Goddard did not intend to attempt to prove the will of the 2nd of October, 1871, and that he was willing that administration with the will (dated the 20th of February, 1870) annexed should issue to Joseph Smith alone. The caveat entered by Arthur Goddard having been withdrawn, such administration was granted to Joseph Smith on the 12th of February, 1872. On the 30th of May, 1872, a citation issued from this Court at the instance of Arthur Goddard, as executor of the will of the 2nd of October, 1871, calling upon Joseph Smith to bring in the above administration, and shew cause why it should not be revoked. An appearance having been entered on behalf of Joseph Smith, both parties filed affidavit of scripts, and on the 28th of June, 1872, the plaintiff filed a declaration in the ordinary form, propounding the will of the 2nd of October, 1871. On the 8th of July Mr. Ayrton, on behalf of Joseph Smith, filed a petition, setting out the above facts, and alleging that by reason thereof Arthur Goddard ought not to be allowed to proceed in the suit. It prayed the Court to order the contentious proceedings to be discontinued, and to condemn the plaintiff in the costs, or, if the proceedings were continued, to order the plaintiff to give security for costs. An answer to this petition was filed on the 6th of August, 1872, in which the relevancy of most of the facts stated in the petition was denied, and it explained that Arthur Goddard having been advised by his then solicitor that great expense would be incurred by seeking to establish the will of the 2nd of October, 1871, against the opposition threatened thereto by Joseph Smith, he did unwillingly and against his own judgment consent to the caveat entered on his behalf being withdrawn. It further stated that the appearance entered on behalf of Joseph Smith on June 6th, 1872, was an absolute appearance, and that by reason thereof, as well as by his having brought in the letters of administration in obedience to such citation, and by having received the declaration delivered on behalf of Arthur Goddard, the said defendant, Joseph Smith, had

debarred himself from objecting by petition to the proceedings of Arthur Goddard. That the consent of Arthur Goddard to administration with the will annexed passing in common form to Joseph Smith, is no bar or hindrance to his calling it in and citing the said Joseph Smith to shew cause why it should not be revoked, the validity or invalidity of the said will of the 2nd of October, 1871, never having been determined by any competent tribunal, and persons other than the said Arthur Goddard being interested under it.

Nov. 30. *Dr. Swabey* appeared for the plaintiff. He raised the preliminary objection, that inasmuch as the defendant had entered an absolute appearance to the citation, had brought in the administration sought to be revoked, and had accepted the declaration, it was too late to go into the question whether he ought to have brought in such administration. He should have appeared under protest. As there has been no litigation between the parties as to these wills—no contentious proceedings—there is no ground to discontinue the suit. He referred to *Trower* v. *Cox* (1), *Bell* v. *Armstrong* (2), *Bailey* v. *Bristowe* (3), *Wytcherley* v. *Andrews* (4), and *Mitchell* v. *Gard.* (5)

Bayford, for the defendant. The plaintiff having answered the petition, the preliminary objection fails. There have been former proceedings between these parties, in which the plaintiff, with full knowledge of all the circumstances, permitted the defendant to take a grant of administration with a will annexed in common form. He is therefore estopped from discussing the question which is the last will of the deceased. He cited *Pickard* v. *Sears* (6), *Tyerman* v. *Smith* (7), *Cairncross* v. *Lorimer* (8), *Newell* v. *Weeks* (9), and *Ratcliffe* v. *Barnes.* (10)

Cur. adv. vult.

Dec. 17. Sir J. HANNEN. The material facts of this case are these:—The plaintiff propounds an alleged will of William

(1) 1 Add. 219.
(2) 1 Add. 365.
(3) 2 Roberts, 145.
(4) Law Rep. 2 P. & M. 327.
(5) 3 Sw. & Tr. 275; 32 L. J. (P. M. & A.) 129.
(6) 6 A. & E. 469.
(7) 6 E. & B. 719; 25 L. J. (Q.B.) 359.
(8) 3 Macq. 827.
(9) 2 Phillim. 224.
(10) 2 Sw. & Tr. 486; 31 L. J. (P. M. & A.) 61.

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Goddard, deceased, which is dated the 2nd of October, 1871, by which he is appointed executor. The defendant, by petition, prays that the suit may be dismissed and the plaintiff condemned in costs, on the ground that the plaintiff, with full knowledge of the existence of the alleged will of the 2nd of October, 1871, withdrew a caveat which he had entered, and permitted the defendant to obtain a grant of administration with a will, dated the 20th of February, 1870, annexed. The caveat was subducted before any appearance or warning. I am of opinion that, on these facts, the prayer of the petition cannot be granted. It was argued that the plaintiff was estopped from maintaining the suit, on the well-known principle, for which *Pickard* v. *Sears* (1) is the leading authority, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. This principle, however, appears to me inapplicable to the present case. The plaintiff did not by withdrawing the caveat cause the defendant to believe in any state of facts, or to alter his position; he merely left him free to pursue his own course unopposed, namely, to take a grant in common form if he so pleased. Nor can the withdrawal of a caveat be properly likened to a discontinuance of a defence to legal proceedings. The caveat is a mere caution to the Court; contentious proceedings do not begin until an appearance is entered to the warning of the caveat (rule 12) Rules and Orders, 1862; and by the previous subduction the caveator only leaves the Court free to act without notice to him. Several cases were referred to as shewing that under certain circumstances the Court will restrain proceedings after acquiescence in the previously existing state of things. The case of *Hoffman* v. *Norris* (2) offers the nearest analogy, but there there was an acquiescence of seven years, and the party held to be concluded by his conduct had acted and accepted advantages on the assumption that that state of things did not exist which he afterwards sought to establish. The proceedings referred to in the petition anterior to the entering the caveat are not material to the question now before the Court,

(1) 6 A. & E. 469. (2) 2 Phillim. 230, n.

as they occurred before the alleged discovery of the will of the 2nd of October, 1871. For these reasons I refuse the prayer of the petition.

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GODDARD v. SMITH.

Attorneys for plaintiff: *Paterson, Son, & Garner.*
Attorney for defendant: *Ayrton.*

HARTER AND SLATER *v.* HARTER AND OTHERS.

1873

Jan. 14.

Will—Words introduced not in the Instructions—Omission in Probate—Parol Evidence.

Testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms, "the trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same, &c." The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator:—

Held, that, however clearly an error can be established in a will unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court of Probate cannot correct it either by the omission of words or by the insertion of other words.

THE Reverend George Gardner Harter, late of Cranfield, Bedfordshire, clerk, died on or about the 7th of February, 1872, having duly executed his last will and testament, with a codicil thereto, bearing date the 6th of June, 1862, and the 31st of August, 1863, respectively, and thereby appointed James Collier Harter, William Slater the younger, and Elizabeth Jessy Harter executors. The plaintiffs propounded these papers in the ordinary form, but added a clause to their declaration to the following effect: "that the paper writing referred to in the affidavit of scripts filed by the plaintiffs in this cause and marked A. contains (with the exception of the word 'real' which immediately precedes the word 'estate' in the residuary clause thereof) the whole of the said will of the said testator referred to in the said first count of the declaration, and that the said word 'real' was inserted in the said residuary clause of the said will by error contrary to the instructions of the said testator, and was retained therein at the time of the said

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execution of the said will without his knowledge or approval, and that by reason thereof the said word 'real' is not entitled to be included in the probate." The defendants, Mrs. Harter and Miss Sophia Elizabeth Jessy Harter, pleaded (1) that the will and codicil were not executed in accordance with the requirements of the statute 1 Vict. c. 26. (2) They deny that the said word "real" immediately preceding the word "estate" in the residuary clause in the said will was inserted in the said residuary clause by error contrary to the instructions of the said testator, and that the said word "real" was retained therein at the time of the said execution of the said will without his knowledge and approval. (3) That the said will with the said word "real" immediately preceding the word "estate" in the residuary clause thereof was read over by or to the said testator, who was competent to and did understand the same, and that the said testator, at the time of the execution of the said will, knew and approved of the contents of the said will as the same now appear. (4) That the said testator, after executing his said will, duly executed a codicil thereto bearing date the 31st day of August, 1863, and propounded by the plaintiffs in this cause, and thereby confirmed and in law re-executed his said will as the same now appears.

By a settlement made on the marriage of the deceased and the defendant, Mrs. Harter, in 1848, certain property was assigned to trustees for the benefit of the husband and wife during their respective lives, and on the death of the survivor in trust for the benefit of the children of the marriage in such proportion as the father and mother should jointly appoint. By an indenture, dated the 6th of September, 1855, certain freehold and copyhold hereditaments near Wakefield were limited to the use of James Collier Harter and his assigns for life with remainder to the use of George Gardner Harter (the deceased) and his assigns for life with remainder to the use of his first and other sons successively according to seniority in tail male with remainder over. On the 30th of April and 1st of May, 1862, Mr. George Gardner Harter, the deceased, called upon his solicitor, Mr. Slater, of Manchester, and gave him oral instructions to prepare a will, the particulars of which Mr. Slater wrote down at the time. The effect of the instructions was to provide for the widow by an annuity and by a

specific and pecuniary bequest, and by giving her a right to occupy Cranfield Court during her life, and for the daughters by pecuniary legacies. The leasehold estate and other hereditaments in Buckinghamshire and Bedfordshire (which comprised the whole of his real estate) were to be settled on the eldest son in the same manner as the Wakefield estate by the above-mentioned indenture of September, 1855, and he was to have a legacy of 20,000*l.* All the sons (including the eldest) were to share equally in the property referred to in the marriage settlement, and also in the deceased's residuary personal estate. The memorandum containing these instructions was handed to Mr. John Howarth, Mr. Slater's conveyancing clerk, who drew up the draft will. The instructions were fully carried out in the draft, except that the residuary clause was in the following form :—"And subject to the trusts hereinbefore contained upon further trust to stand possessed of all the residue and remainder of my real estate in trust to divide the same between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain twenty-one years for their own respective use and benefit absolutely."

On the 2nd of May Mr. Slater handed the draft will to the testator for perusal. It was returned on the 6th of May with a letter suggesting alterations. The alterations, one of which gave a double portion in the residue to the eldest son were made, and on the 4th of June the testator, having finally approved the alterations, the will was engrossed and forwarded on the 5th of June to the testator, who returned it executed on the 7th of June. The draft was retained by the testator, but the will was deposited in Mr. Slater's office. In August, 1863, a correspondence took place between the testator and Mr. Slater as to the shares the sons took respectively in the residue of his estate.

On the 31st of August, 1863, the testator executed a codicil by which he confirmed his will. The net residue of personalty undisposed of by the will amounted to 150,000*l.* The testator left surviving him a widow, five sons, and five daughters. It was proved that Mr. Howarth did not communicate with the testator, but prepared the draft from Mr. Slater's memorandum. He could have had no doubt that the word "residue" in the memorandum included real

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and personal estate, but by accident the words "and personal" were omitted in the draft. When the testator executed the codicil he had no other paper before him.

Nov. 29. *Dr. Spinks, Q.C.*, and *Dr. Tristram*, appeared for the plaintiffs. This Court has power to correct a mistake in a will, whether it arises from error or from fraud. It used to have such a power before the passing of the Wills Act, and has so still, for it has not been taken away by that statute. Before the Act the Court would carry out the intentions of a deceased, providing they were reduced into writing in his lifetime. The instructions in this case, which were in writing, dispose of the personal residue only and the terms of the residuary clause shew that it was not intended to apply to realty. Although this Court may not be able to introduce the words "and personal," it may expunge the word "real." They referred to *Fawcett* v. *Jones* (1); *Bridge* v. *Arnold* (2); *Barton* v. *Robins* (3); *Damer* v. *Pechell* (4); *Gerrard* v. *Gerrard* (5); *Micklin* v. *Franklin* (6); *Lord St. Helens* v. *Marchioness of Exeter* (7); *Travers* v. *Miller* (8); *Bayldon* v. *Bayldon* (9); *Draper* v. *Hitch* (10); *Castell* v. *Tagg* (11); *Upfill* v. *Marshall* (12); *Allen* v. *M'Pherson* (13); *In the Goods of Duane* (14); *Lister* v. *Smith* (15); *Reffell* v. *Reffell* (16); *Charter* v. *Charter* (17); *Guardhouse* v. *Blackburn* (18); 1 Wms. Exors. (6th ed.) 343.

Inderwick and *Mellor* appeared for the respective defendants. They contended that the Court of Probate has no power to amend an error simply as such, whether the error appears on parol or by a written document. There is no ambiguity on the face of the paper, and, therefore, there is no opening for parol evidence. The Wills Act enacts that a will to be valid must be executed in a

(1) 3 Phillim. 434.
(2) 2 Phillim. 455.
(3) 2 Phillim. 455, n.
(4) 2 Phillim. 458.
(5) 2 Phillim. 459.
(6) 2 Phillim. 461.
(7) 2 Phillim. 461, n.
(8) 3 Add. 226.
(9) 3 Add. 232.
(10) 1 Hagg. Eccl. 674.
(11) 1 Curt. 298.
(12) 3 Curt. 636.
(13) 1 H. L. C. 191.
(14) 2 Sw. & Tr. 590.
(15) 3 Sw. & Tr. 282; 32 L. J. (P. M. & A.) 13.
(16) Law Rep. 1 P. & M. 139.
(17) Law Rep. 2 P. & M. 315.
(18) Law Rep. 1 P. & M. 109.

particular manner, and that only is the will which has been executed in that manner. Even if the Court could have corrected the will as it originally stood, it could not do so after the execution of the codicil which confirmed the will. They referred to *Rockell* v. *Youde* (1); *Shadbolt* v. *Waugh* (2); *In the Goods of Wilson* (3); *Mitchell* v. *Gard* (4); *Birks* v. *Birks* (5); *Drake* v. *Drake* (6); *Stanley* v. *Stanley* (7); *Atter* v. *Atkinson.* (8)

Cur. adv. vult.

Jan. 14, 1873. SIR J. HANNEN. In this case the plaintiffs, two of the executors of the will of the Rev. George Gardner Harter, deceased, dated the 6th of June, 1862, propound the said will, together with a codicil thereto of the 31st of August, 1863, and in their declaration allege that the word "real," which immediately precedes the word "estate" in the residuary clause of the will was inserted in the said residuary clause by error, contrary to the instructions of the testator, and was retained therein at the time of the execution of the will, without his knowledge or approval, and that by reason thereof the said word "real" is not entitled to be included in the Probate. One of the defendants, Elizabeth Jessy Harter, the widow and remaining executrix of the will has pleaded denying that the word "real" was inserted in the residuary clause by error, contrary to the instructions of the deceased, and that the said word "real" was retained therein without the testator's knowledge and approval, and a further plea that the will with the word "real" in the residuary clause was read over by and to the said testator, who was competent to, and did, understand the same; that the testator at the time of the execution of the said will knew and approved of the contents thereof as the same now appear; and, lastly, that the testator, after executing this said will, duly executed the codicil thereto, dated the 31st of August, 1863, and thereby confirmed, and, in law, re-executed his said will as the same now appears. These portions of the pleadings are sufficient to shew the questions

(1) 3 Phillim. 141.
(2) 3 Hagg. Eccl. 570.
(3) 2 Curt. 853.
(4) 3 Sw. & Tr. 275; 32 L. J. (P. M. & A.) 129.
(5) 4 Sw. & Tr. 23; 34 L. J. (P. & M.) 90.
(6) 8 H. L. C. 172; 29 L. J. (Ch.) 856.
(7) 2 J. & H. 491.
(8) Law Rep. 1 P. & M. 665.

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which arise for decision in the cause. By the settlement executed on the marriage of the deceased, he had, with his wife, a joint power of appointment of moneys, amounting on the whole to 65,000*l.*, for the benefit of one or more of his children. By a subsequent settlement certain freehold and copyhold hereditaments in the county of York stood at the time of the execution of the will in question limited to the use of the deceased and his assigns for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The deceased was also possessed of real estate of considerable value, and of personalty of the value of about 200,000*l.* In this state of things, the deceased, on the 1st of May, 1862, after full explanation from his solicitor, Mr. Slater, of the position of affairs in reference to the said settlements, gave him oral instructions for the preparation of his will. Mr. Slater, in the presence of the deceased, wrote a memorandum of these oral instructions. The deceased also instructed him to prepare a joint appointment under the power in that behalf in the marriage settlement, and this was, as stated by Mr. Slater, part of the scheme the testator wished to be carried out in connection with his will. The memorandum of the instructions for the will is before the Court, and is as follows: "Give to wife, Elizabeth Jessy Hall, provisions, wines, liquors, carriages, horses, harness, live and dead stock in and about my dwelling-house and farm at Cranfield, except plate and furniture, with 1000*l.* legacy to wife absolutely. Set apart a sum sufficient to raise an annuity of 2000*l.* per annum to Mrs. Harter for life, with powers of investment. Give to Mrs. Harter the privilege of occupying, rent free, the house, outbuildings, garden, and pleasure-grounds at Cranfield Court, until eldest son for the time being shall attain twenty-five years of age, provided she so long remains my widow; and during such occupation of the house Mrs. Harter to have the use of the plate and furniture without liability to loss or breakage. Limit (subject to interest in Cranfield Court given to Mrs. Harter) the Cranfield and other estates in Bedfordshire or Buckinghamshire, including the advowson of Cranfield, and the plate to like limitations as the Yorkshire estate, subject to previous trusts. Give furniture at Cranfield Court to eldest son for the time being on attaining twenty-five. Also give him 20,000*l.* on attaining

twenty-one. Give legacy of 10,000*l.* to each of my daughters, Sophia Elizabeth Jessy H., and Eleanor Maude H., on twenty-one or marriage. And the residue equally among all the sons, including the eldest for the time being, on attaining twenty-one. Maintenance, education, and advancement clauses during minority, as usual. Trustees and executors, my wife and my brother, James Collier Harter." Mr. Slater subsequently handed this memorandum to his managing clerk, Mr. Howarth, who drew up a draft will. In this draft the residuary clause is drawn in the following words: "And subject to the interests hereinbefore contained, upon further trust to stand possessed of all the residue and remainder of my real estate, in trust to divide the same equally between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain their respective ages of twenty-one years, for their own use and benefit absolutely." A joint appointment providing for the equal division of the funds settled by the marriage settlement was also drawn up. On the 2nd of May Mr. Slater handed to the deceased a fair copy of the draft for his perusal; and on the same day the draft of the joint appointment was also furnished to the deceased. On the 6th of May the deceased returned to Mr. Slater the draft will, as to which, after stating that he had carefully perused it, he suggested certain alterations. These were afterwards embodied in the draft in red ink, and the draft, so altered, was again returned to the deceased. Between this time, the 9th of May, and the execution of the will on the 6th of June, several letters passed between the deceased and Mr. Slater on the subject of the will, which clearly shew that the deceased read and fully considered the will, and suggested an alteration in the residuary clause, by which the eldest son was to take a share equal to two of his brothers' shares; but no reference is made in the correspondence to the terms in which the residuary clause was worded, and it remained, with the exception of the above-mentioned alteration, as drawn in the first draft, and was so copied into the will, which was ultimately executed. Mr. Howarth, the managing clerk to Mr. Slater, was called as a witness, and stated that he understood the word "residue" in the instruction, to mean "real and personal," but that by inadvertence he drew it as it now stands, and never

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noticed the error. Mr. Slater also stated that the terms of the residuary clause entirely escaped his attention. Upon the evidence afforded by the documents in the cause as well as by the oral testimony of the witnesses, I entertain no doubt that the residuary clause, as it stands in the will, does not express the real meaning of the testator. It was not his intention that there should be an intestacy as to his residuary personalty, but that he intended that such residue should be divided amongst his sons, the eldest taking two shares. It is necessary that I should state what appears to me to have been the exact nature of the error by which a failure to express the true intention of the testator has arisen. I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause. The memorandum of instructions drawn up by Mr. Slater, deals with realty as well as personalty, and then proceeds to dispose of the residue. This, without qualification, would mean the residue of the testator's property generally, real and personal; and so it was understood by Mr. Howarth, who drew the will. It makes no difference in my judgment, that the testator had not at the time any other realty than that which he had specifically disposed of. That fact may possibly have made him or Mr. Slater careless in the use of a general term wide enough to include realty, if it had existed, but it does not negative an intention on their part to use the word in its ordinary and more extended sense. There was no intention on the part of the testator to leave an intestacy as to any other real estate which he might possess or acquire, but in the belief that he had not and probably would not have any, he was content to use language wide enough to include it. Nor does the fact that the language of the residuary clause in disposing of the residue is rather applicable to personalty, make any difference. On this point the observations of Lord Cottenham in *Saumarez* v. *Saumarez* (1) may be referred to. "The circumstances of the testator using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that realty would be part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the

(1) 4 M. & Cr. at p. 340.

operation of the general intent of passing all the residue of his property;" and again, at page 339, "In considering gifts of residue, whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed such gifts may be introduced to guard against a testator having overlooked some property or interest in the gifts particularly described." This view of the facts leads me to a conclusion which is decisive of the case. I think it is not in the power of the Court to supply words accidentally omitted from a will. The Wills Act (1 Vict. c. 26, s. 9) admits of no qualification. "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned," that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personalty of the deceased fulfilling the requirements of the Act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. "With respect to wills made on or after January, 1838," says Sir E. V. Williams (1), "it is plain that by reason of the provisions of the statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing and attested pursuant to the Act. Whence it follows that the Court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends." This disposes of the numerous cases, which were cited in argument, of dates anterior to 1 Vict. c. 26; and with regard to wills to which that statute is applicable, it has not been suggested that the Court can admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will. But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words "and personal" were omitted, but that the word "real" was inserted, and that the will ought to be made to read "all the residue and remainder of my estate." I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word "real" from the residuary clause. There are un-

(1) 1 Wm. Exors. (6th ed.) 345.

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doubtedly numerous cases which establish that this Court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of *Fawcett* v. *Jones* (1), which, though relating to wills before the statute 1 Vict. c. 26, are on this head applicable to wills of a later date. And in the case of *Allen* v. *McPherson* (2), Lord Lyndhurst said, "It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as to the rest." Lord Campbell (3) in the same case says, "It is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because, giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon, and probate of that part of the codicil ought to have been refused." In that case fraud was the ground on which it was sought to expunge a part of a codicil; but *In the goods of Duane* (4) Sir C. Cresswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. Sir C. Cresswell, after referring to *Allen* v. *McPherson*, said: "I can see no difference in principle between that case and the present one, where a clause for which the deceased gave no instructions, and which was not read over to him, formed per incuriam part of the document signed by the deceased." The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the Court is asked to remedy the mistake, not by rejecting

(1) 3 Phillim. 434.
(2) 1 H. L. C. at p. 209.
(3) 1 H. L. C. at p. 233.
(4) 2 Sw. & Tr. 590.

words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will. The theory of the plaintiffs, is that the testator had his personalty only in his mind, when he gave instructions for the residuary clause, because he had no realty undisposed of. If so, the proper mode of carrying out the instructions would have been to say, "the residue of my personal estate;" and in that case the error consists in having substituted the word "real" for "personal." Upon this hypothesis the Court is asked to strike out the word "real," not because the clause would then be in the form the testator intended, but because it would in its transformed shape substantially carry out the testator's wish. It is also to be observed, that not only the form, but probably the effect would be different; for a bequest of the residue of the testator's estate would, according to the modern decisions, include the reality, unless the context clearly excluded it: Jarm. on Wills, ch. 22: *The Mayor and Corporation of Hamilton* v. *Hodsdon.* (1) Such a mode of dealing with wills would lead to the most dangerous consequences; for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come before the Courts of Law and Equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked, first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended. If I felt myself at liberty to adopt such a course, I should think that the best amendment of the will would be to leave the word "residue" by itself in the residuary clause as it is in the memorandum of instructions. But it is obvious that, though this might

(1) 6 Moore P. C. 76.

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give effect to the testator's wishes in this instance, it would be by an accident; for the word "residue," taken with the context of the will, might have had a different effect to that which it has in connexion with the context of the instructions; but, for the reasons I have given, I entirely repudiate this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this Court to correct it. I have thus far considered the case, apart from the decision of Lord Penzance in *Guardhouse* v. *Blackburn* (1), but I must add that it appears to me that that is an authority directly decisive of this case in favour of the defendants. It was there established to the satisfaction of the Court that specific words had been inserted by the attorney who drew the codicil by mistake, and without instructions. Yet the learned judge held that as the contents of the codicil had been brought to the knowledge of a competent testatrix, the execution of the instrument must be deemed conclusive evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this Court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document. The conclusion I have arrived at makes it unnecessary that I should express a positive opinion on the effect which the execution of the codicil would have had on the will, if I had thought that the word "real" ought to be expunged from the residuary clause, but I am strongly inclined to think that it would have made no difference, and that the codicil must be held to confirm only that which was the true will of the testator. For these reasons I pronounce for the will in its present form.

Attorneys for plaintiffs: *Milne, Riddle & Mellor.*
Attorneys for defendants: *R. M. & F. Lowe.*

(1) Law Rep. 1 P. & M. 109.

ORTON *v.* SMITH. 1873

Jan. 14.

Costs out of Estate—Unsuccessful Opposition to Will—Pleas of Undue Influence and Fraud.

The Court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified those pleas.

THE plaintiff propounded, as executor, the will, dated the 23rd of May, 1872, of Isaiah Smith, late of Foleshill, in Warwickshire, tanner and farmer, who died in June, 1872. By the will, the testator gave legacies of 50*l.* each to a brother and sister, and the rest of his property to Mr. and Mrs. King, with whom he had been living for some years before his death. The defendants, who were the next of kin, opposed the will, alleging incapacity, undue influence, and fraud. The cause was tried on the 11th, 12th, and 17th of December, 1872, before Sir J. Hannen, without a jury. The plaintiff, who was the medical attendant of the deceased, gave positive evidence as to the testator's capacity and as to his having given instructions for the will; but he was not present when the will was executed. The Kings and other witnesses were also examined. The defendants' case was that the testator's signature to the will was a forgery, and Mr. Chabot, the expert, was examined, and gave a decided opinion to that effect. The trial was adjourned in order that the plaintiff might submit the signature to another expert, but the opinion of that expert was also against the genuineness of the signature, and he was not called. The Court, being unable to see any ground for coming to the conclusion that the evidence of the plaintiff was untrue, and also relying on the evidence of a solicitor's clerk who was in the testator's house when the will was executed, although not in the room, and being unable, on a comparison of handwriting, to concur in the opinion of Mr. Chabot, pronounced for the will; but allowed the defendants' costs out of the estate after payment of the plaintiff's costs.

A. Staveley Hill, Q.C., and *Bayford*, for the plaintiff, were after-

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wards heard on the question of costs. The property is very small, and it is doubtful whether there will be sufficient to pay the plaintiff's costs and the legacies. The defendants having taken upon themselves to establish a case of undue influence and fraud, and having failed, ought to be condemned in costs. Even if there was reasonable ground for contesting the will and raising those issues, that would not entitle them to costs out of the estate, but would merely protect them against condemnation in costs.

Dr. Spinks, Q.C., and *Searle*, were for the defendants.

SIR J. HANNEN. I gave my most anxious attention to this question of costs, and I remain of the same opinion as before respecting it. The case was a peculiar one. An apparently respectable man, against whom nothing came out in the course of the trial which justifies me in saying that I would not believe him—I mean Mr. Orton—gave evidence, which, if true, proved that he had himself received instructions for the will from the testator, and that the will was drawn up in accordance with those instructions by an attorney against whom also nothing appeared tending to shew that he was not trustworthy. There was also no doubt, on the evidence of that attorney's clerk, that the will was taken up to the testator's room, and was brought down again duly executed. Some witnesses further spoke to declarations of the testator referring to the execution of the will. What appeared on the other side? There was the evidence of a gentleman, for whose judgment I have a great respect, Mr. Chabot. I have frequently had occasion to observe the value of that gentleman's evidence, but in this case his evidence, that he did not think the signature to the will was genuine, was founded upon a single signature, and, for the most part, upon a single letter. If I had acted on his evidence I should, in effect, have convicted three persons at least of fraud and forgery. I came to the conclusion that, the evidence of those witnesses being unimpeached, I could not, on the theoretical evidence of Mr. Chabot alone, refuse credence to their statements. But in dealing with the question of costs, I have to consider all the facts of the case. I understand the rule as to costs to be that if the circumstances are such as to justify the litigation, then this Court, going farther than other courts, is in

the habit of allowing the party who has entered into a litigation which it considers reasonable and justifiable to have his costs out of the estate. Undoubtedly it frequently refuses such an indulgence where the plea of fraud is improperly pleaded, but the question whether such a plea was justifiable must be judged upon its merits in each case that comes before the Court. Now, in this case, there were many facts calculated to excite grave suspicion. There was the fact that Mrs. King, having got the will executed, never mentioned it to the members of the family of the testator who soon afterwards came to the house. That was conduct which led to doubt and suspicion. More than that, there was the very remarkable fact, the true explanation of which remained in obscurity to the last, that after the execution of the will Mrs. King got a neighbour to write the testator's signature on two cheques instead of obtaining the testator's own signature to them. Although that circumstance did not go directly to the merits of the case, it was certainly calculated to excite grave suspicion, and the reason why the cheques were signed by some one other than the testator remained to the last in confusion and obscurity. One of the grounds on which the Court always allows costs out of the estate is that the testator has left his testamentary papers in such a state that they excite suspicion and invite litigation. Assuming that I was right in the conclusion to which I came on the merits, it was a misfortune that the mode in which the testator executed the will certainly gave rise to the most natural and well founded suspicion, for the signature was evidently patched and altered. I could not come to the conclusion that the signature was a forgery. I could not believe that the ignorant people who were about the testator when the will was executed were prepared with the means of obliterating a part of the signature. If they were not, it must be asserted that the attorney or Mr. Orton must have used some means of obliteration; but this was not proved. It was a very great misfortune that the testator executed the will in such a manner as to give rise to very serious suspicions.

These are the grounds on which I thought the defendants' costs should be paid out of the estate after a full indemnity had been given to the successful party for his costs. I very much regret that the value of the estate is so small as to make this probably a

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barren victory for the Kings, but I must not allow that consideration to influence me in determining the question whether or not this was a reasonable and proper litigation.

Solicitors for plaintiff: *Sharp & Co.*
Solicitor for defendant: *W. Tindal Perkins.*

Jan. 21.

IN THE GOODS OF SYKES.

Will—Appointment of Executor on an Erasure—Declaration of Testator—Subsequent Codicil.

1 P.D. 217

The deceased executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The Court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor.

WILLIAM HENRY SYKES, of Albion Street, Hyde Park, Middlesex, died on the 16th of June, 1872, having executed a will, dated the 9th of November, 1869, and a codicil, dated the 10th of August, 1870; the latter referred to the will by its date. Some time in 1871, the testator deposited a sealed packet with Major-General Sir George Balfour, which remained in his custody until after the death of the deceased. It was then opened, and found to contain the will and codicil. In the will Dr. John Scott was appointed executor, but his name was written upon an erasure. There was no evidence to shew when such name had been written; but Major-General Sir George Balfour, in his affidavit, stated that the testator informed him, fully two years before he deposited the sealed packet in his custody, that Dr. John Scott was one of his executors.

Jan. 14. *Dr. Tristram* moved for probate of the will and codicil to be granted to Dr. Scott, as the executor named in the will. The Court must be satisfied, from the affidavit of Major-General Balfour, that the name of Dr. Scott was written in the will before the execution of the codicil, which republishes the will in its then state. He referred to *Swete* v. *Pidsley.* (1)

Cur. adv. vult.

(1) 6 No of Ca. 189.

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Jan. 21. SIR J. HANNEN. This is a question as to an alteration in the will of the deceased. Was it made before or after the execution of the will, or before or after the execution of a subsequent codicil? The will is dated the 9th of November, 1869, and the appointment of Dr. Scott as executor is written on an erasure. The question arises, whether this alteration is effectual. In the absence of evidence there is, in general, a presumption that all alterations made in a will were made after its execution. The authority for this is *Cooper* v. *Bockett.* (1) But the rule is somewhat differently expressed by the late Lord Chancellor, then Sir W. P. Wood, in *Williams* v. *Ashton.* (2) He there said, "I do not think that it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or another. The correct view is that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed. I do not consider that the Court is bound to say that it will presume such alterations to have been made, either before or after execution. With regard to a will, I do not see any necessary presumption of the kind." The onus, therefore, lies on those who assert the alteration to shew that it was made before the execution of the will. Stated, however, as the rule generally is, that there is a presumption that alterations on the face of a will were made after its execution, this presumption may be rebutted by evidence of declarations made before and not after the execution: *Doe & Shallcross* v. *Palmer.* (3) There the evidence was of declarations of an intention of the testator, which appeared to have been carried into effect by the will as altered, and not as it originally stood. In that case, as well as in *Williams* v. *Ashton* (2), the Court dealt with the alterations on the will itself, and without any question as to the effect of the execution of a subsequent codicil. Now a codicil is the republication of a will, and usually the presumption remains the same as regards the codicil as the will; so that it will be presumed, without any evidence to the contrary, that alterations appearing on the face of the will were made not

(1) 4 Moo. P. C. 419. (2) 1 J. & H. 115.
(3) 16 Q. B. 747; 20 L. J. (Q. B.) 367.

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only after the execution of the will, but also of the codicil: *Lushington* v. *Onslow.* (1) It would appear, however, that as the declarations of a testator, made before the execution of a will, are admissible to shew that alterations were made before such execution, so declarations made before the execution of a codicil, which republishes the will, may be admitted to shew that the alterations in the will were made before the execution of the codicil. In the present case the affidavit of Major-General Sir George Balfour states, that on an occasion before the execution of the codicil the testator told him that he had appointed Dr. Scott his executor. This is a much more positive and stronger declaration than that made in *Doe & Shallcross* v. *Palmer* (2), because it might be said that a statement by a man that he intends to make a bequest to a certain individual, leaves open the question whether the corrections, to carry out such intention, were made after the execution of the will, the document as originally executed having failed to do so. In this case the declaration is as to an act already done, and can only be correct if it be assumed that the appointment had been then made. The execution of the codicil was the confirmation of the will in its altered state, with the appointment of Dr. Scott on it. I decree probate to him.

Attorney: *B. F. Watson.*

Jan. 21.

DAVIES *v.* GREGORY AND OTHERS.

Costs out of Estate—Unsuccessful Opposition to Will.

The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits, and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity.

In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a bonâ fide belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs.

THOMAS HOLME, late of the City Road, London, died in May 1872, leaving a will dated the 30th of April, 1870, which was pro-

(1) 6 No. of Ca. 183. (2) 16 Q. B. 747; 20 L. J. (Q.B.) 367.

pounded by the defendants as executors. The plaintiff was the sister and next of kin of the testator, and the validity of the will was contested by her and by the executors of a deceased sister (cited to see proceedings) on the ground that the testator was not of sound mind at the time of its execution. The testator was possessed of personal property amounting to about 90,000*l.*, and by the will he distributed the whole of that property (with the exception of legacies of 500*l.* to each of the executors, 100*l.* to Mrs. Taylor, one of his sisters, since deceased, and 100*l.* to a friend) amongst various hospitals, and other charitable and religious societies. He directed that one half of the residue (if any) should be given to the Stationers' Company, of which he was a member, and that the other half should be divided between the two executors, Mr. Gregory and Mr. Francis. Mr. Gregory was a retired upholsterer and undertaker, who had buried the testator's father and mother, and with whom he had kept up a slight acquaintance, and Mr. Francis was the solicitor who prepared the will. The cause was tried before Sir J. Hannen, without a jury on the 19th, 20th, 21st, and 23rd of December, 1872, and on the 11th of January, 1873.

Sir J. Karslake, Q.C., *Dr Spinks, Q.C.*, and *Searle* were for the executors propounding the will; *Dr. Swaby* for the Stationers' Company; and *Pritchard* for some of the charities; *Dr. Deane, Q.C.*, *Parry, Serjt.*, and *Dr. Tristram* for the next of kin; and *Inderwick* for the executors of the deceased's next of kin.

On the 15th of January, 1873, Sir J. Hannen delivered judgment, and pronounced for the will.

Dr. Spinks moved that the next of kin might be condemned in costs. There was no reasonable ground for contesting the will on the ground of incapacity. But if there were reasonable ground for an inquiry into the testator's capacity, that would only relieve the next of kin from condemnation in costs, and would not entitle her to costs out of the estate. The costs of an unsuccessful opposition were never allowed out of the estate except in cases where the executors or residuary legatees had by their own conduct given cause to suspect the validity of the will, and where the

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litigation was caused by the condition in which the deceased had left his testamentary papers. In the present case no blame was imputed to the executors, and the testator had taken every possible precaution against future litigation in the preparation and execution of the will, and his testamentary papers were in perfect order.

Parry, Serjt., for the next of kin, moved that the costs of the opposition might be allowed out of the estate. The sister of the testator who contested the will, had not seen him, or held any communication with him for many years before his death, and when the evidence of the witnesses who had been examined in opposition to the will was brought to her knowledge, she was bound to insist on an investigation into his state of mind. She had no means of ascertaining whether that evidence was true or false. The Court had come to the conclusion that it was to some extent true, but that there was a great deal of exaggeration in the statements of many of the witnesses. If the evidence of those witnesses as it was laid before her had been accepted by the Court, the testator's incapacity would have been established; and considering that so large a property was left to charities, and that the residuary legatees were persons who had little acquaintance with the testator, and no claim upon his bounty, the next of kin was quite justified in taking the opinion of the Court upon that evidence.

The cases of *Frere* v. *Peacock*, (1) *Mitchell* v. *Gard*, (2) and *Summerell* v. *Clements* (3) were cited.

Cur. adv. vult.

Jan. 21. SIR J. HANNEN. I have been called upon to give my opinion on the question, whether the costs of this litigation should be borne by the parties who unsuccessfully opposed probate of the will, or whether each party should pay their own costs, or whether the costs of the opposition should be paid out of the estate. I thought it necessary to take time to consider the principles which ought to guide me in dealing with the question of costs, not only in this but in other testamentary cases. It was contended by Dr. Spinks, for the executors, that the general rule

(1) 1 Robert 442.

(2) 3 Sw. & Tr. 275; 33 L. J. (P. M. & A.) 7. 10 Jur. N.S. 51.

(3) 3 Sw. & Tr. 35; 32 L. J. (P. M. & A.) 33; and cases collected in 32 L. J. (P. M. & A.) 33, note 2.

was that costs should be allowed out of the estate only in cases where the state in which the deceased left his papers had given rise to the litigation. It was admitted that there were some exceptions, but that was said to be the general rule. No doubt there was an unwillingness on the part of the Court formerly having jurisdiction in testamentary causes to grant costs out of the estate. The first infringement of the general rule that the unsuccessful party should pay costs was in cases where the testator had left his papers in confusion. But it is plain that if the question be asked, why should costs be paid out of the estate in such cases, the answer must be, because the conduct of testator himself caused the litigation. That principle having once been extracted from the decisions, we should no longer slavishly confine ourselves to precisely the same state of facts in applying it, but should apply it to all cases to which it is fairly applicable. The principle being as I have stated, the question to be determined in each case is this: Is the testator, by reason of his conduct, to be considered the cause of the reasonable litigation which has occurred after his death as to the validity of his will? There are many cases in which it has been held that where reasonable doubts existed as to the testator's testamentary capacity the costs might be given out of the estate. *Frere* v. *Peacock* (1) is an illustration of this rule, although the facts were by no means the same as those of the present case. In many other cases, which I need not refer to, the costs have been decreed to be paid out of the estate. I have also been referred to a case in Ireland, in which the same rule in its larger sense was laid down: *Fairtlough* v. *Fairtlough*. (2) That case is well deserving the attention of all whose duty it may be to deal with the difficult subject of mental competency, for it illustrates in a remarkable manner the complex nature of the human mind and brain. The testator, in consequence of an attack of paralysis, whilst retaining perfect possession of his intellectual powers, lost all power of spontaneously summoning up the correct name or expression corresponding with the idea existing in his mind. This peculiar form of mental ailment is not uncommon, for I have known two exactly similar cases within the range of my own experience. It shows that the machinery of the human mind may

(1) 1 Robert. 442. (2) Milward, 36.

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as to a part of it be thrown out of gear, leaving the intellect substantially intact, just as a clock may keep time correctly, although the striking apparatus may be disordered. Dr. Radcliff in commenting on that case says :—"The principle of awarding costs out of the fund in testamentary cases is not confined merely to cases where the question arises upon the state in which the deceased has left his testamentary papers. The rule should be taken in a wider view, and, wherever it is proper to specially bring the matter before the Court for its opinion, the costs may be given out of the estate. The passage in Williams' Law of Executors (pt. I. bk. IV. c. ii. s. vii.) refers merely to cases where the question submitted to the Court arose from the state of the deceased's testamentary papers, but does not say that such is the only case on which the costs can be so awarded; that is but *one* of the special cases where the Court will direct the costs to be paid out of the estate, and is not applicable to the present case. The case of *Ross* v. *Chester* (1), extends the principle. There was no question arising in that case from the state of the papers, but the will being made *in articulo mortis*, the Court considered that the next of kin were fully justified in entering into the investigation, and were entitled to their costs. *Fulleck* v. *Allinson* (2), was a case of monomania. The will left all the property in charity. The monomania did not affect the will, nor was it proved clearly to have existed *at the time of its execution;* yet Sir J. Nichol intimated no doubt of his authority to give, and gave, the costs to the next of kin out of the fund. It was argued here by Dr. Hamilton that the executor in that case consented; it was not so, he was a nude executor, and could not consent, and the consent of the party could not give jurisdiction. Sir J. Nichol expressed himself as disinclined, on account of the great bulk of evidence introduced, to allow the costs out of the estate, but did so under the very peculiar circumstances of the case. In this case it was quite proper and necessary that the opinion of the Court should have been taken. . . . Under all the circumstances I shall allow the impugnant his costs out of the estate, but shall direct them to be taxed as between party and party."

That being the principle on which this question of costs out of

(1) 1 Hagg. Eccl. 235. (2) 3 Hagg. Eccl. 527, 547.

the estate ought to be dealt with, the next branch of the inquiry is under what circumstances ought each party to pay his own costs? Where the facts show that neither the testator nor the persons interested in the residue have been to blame, but where the opponents of the will have been led reasonably to the bonâ fide belief that there was good ground for impeaching the will, there will be no order as to costs. Of course the opponents must have taken all proper steps to inform themselves as to the facts of the case, but if, having done so, they bonâ fide believe in the existence of a state of things which, if it did exist, would justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs.

I now have to consider under which head I ought to rank the present case, and I have come to the conclusion that it must be ranked under the first head. I consider that the testator's own conduct has reasonably led to the litigation. The whole series of facts proved before me must be taken in connection with each other; no single fact can be separated from the rest. Broadly the case was this:—A man secluded himself and lived entirely apart from society, neither giving nor receiving visits. He continued that course of life for many years, and in his later years—the years immediately preceding and subsequent to the execution of the will—and down to the time of his death, his habits became more and more singular. I came to the conclusion that some of his acts might be accounted for by the fact that he gave way to intemperance of a particular kind. He does not seem to have taken much if any more stimulant than before; but he continued to take the same amount, notwithstanding increasing weakness and indigestion, and what he took had a greater effect upon him. When under the influence of drink he gave way to irrational and passionate expressions of anger against those about him and others. I acquitted him of the graver acts imputed to him, but I saw no reason to doubt the substantial truth of the statements of Mrs. Mechi, the landlady of the lodgings at which he lived from early in 1870 until his death, as to what he said and did. He was occasionally betrayed into violence of language amounting to threats against her. She gave the best possible proof that she really entertained

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doubts of his sanity, and of her safety if he remained with her, for she said that she gave him notice to quit in consequence of his becoming so "vicious." Added to this, there were some acts proved to have been done by him which have a considerable bearing on this question. On one occasion, for instance, he tore up his clothes. I agree with the medical witnesses, that, although a wanton causeless destruction of property is a strong indication of madness, a single instance of such destruction cannot be taken as the basis of an opinion, but the act was a strange one. The singularity, too, of the will in many respects must be considered. I do not dwell on his giving so much to charitable societies; but it was singular to choose as executor, and one of the residuary legatees, a person of whom he knew nothing, except that he was an undertaker, and had buried some members of his family.

The result is that I come to the conclusion that the testator did by his conduct naturally lead those interested in his property to suppose that there was ground for alleging that he was of unsound mind. The next of kin had no means of personally forming an opinion as to the condition of the testator during the later years of his life, for she never saw him.

I regret that it is not in my power to direct the costs to be paid rateably by the residuary legatees and the charities who benefit so largely by the testator's bounty; but I may make the reflection, that it was plainly not the testator's intention that there should be any large amount to be divided between the residuary legatees: indeed, his anticipation that there would be little or no residue was urged as a reason for his disposing of it as he did. Besides, the fact that the loss occasioned by this order as to costs will fall on the residuary legatees is common to all these cases. On the grounds I have stated the defendants' costs must be paid out of the estate.

Solicitors for plaintiff: *Wilkinson & Drew.*
Proctor for defendants: *J. Wills.*

IN THE GOODS OF REYNOLDS. 1873 Feb. 4.

Will—Codicil—Subsequent Will—Codicil referring to first Will by Date—Revival.

The deceased executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R., dated May, 1866, in presence of," &c. :—

Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871.

BRYAN REYNOLDS, late of Cheltenham, Gloucestershire, died on the 27th of December, 1872. Several wills and codicils were found on his death, both attested and unattested, in all of which, after making provision for his wife, he constituted his son William Brook Reynolds residuary legatee and sole executor. On the 18th of May, 1866, he executed a will in which he gave to his wife 20*l.* and his leasehold property at Somers Town for life, with directions that she should not mortgage or sell her interest in such leasehold property. He made his son residuary legatee, and appointed him sole trustee and executor. By a will dated the 12th of December, 1870, the deceased disposed of his whole property, and thereby revoked the will of May, 1866. Some time previous to May, 1871, the deceased handed an envelope (which had been sealed, but opened) to his son, which he stated to be his last will and testament, and directed him to take charge of it until after the testator's death. He did so, and it was found to contain the will of the 18th of May, 1866. On the 12th of May, 1871, the testator executed a codicil, which purported to be a codicil to the will of May, 1866. By this the wife took the interest of fifteen Union Bank shares for life, and the household furniture absolutely, except certain articles of plate, &c., specially mentioned. This codicil was found in an envelope endorsed "Codicil of the will of Bryan Reynolds, dated the 12th of May, 1871. The will in the possession of William Brook Reynolds." On the 7th of November, 1871, he completed another will, in which he revoked all other wills and codicils. By this he gave Mrs. Reynolds 20*l.*, the dividends from twenty-five

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Union Bank shares for life, and the furniture, with the same exceptions, or nearly so, as in the codicil of May, 1871. On the 19th of December, 1872, he executed another codicil in the following terms. "This is a codicil to the will of Bryan Reynolds, dated May, 1866. I give to my son William Brook Reynolds my leasehold property in Somers Town, in the occupation of J. W. Lane, also my house, 49, Pembroke Square, Kensington, in trust, that he shall pay the respective rents to my wife during her life in such manner that she may not anticipate or transfer the said rents before they shall become due. I give to my wife the furniture and effects in my dwelling-house, except, &c. (the exceptions were almost the same as in the codicil of the 12th of May, 1871), and I confirm the appointment of my son as residuary legatee and executor of my will and codicil." The attestation clause commenced, "Codicil to the will of Bryan Reynolds, dated May, 1866, in the presence of us," &c.

Dr. Spinks, Q.C., moved for probate of the will of the 18th of May, 1866, and the codicil of the 19th of December, 1872, as together containing the will of the deceased. There is no evidence of intention to be gathered from the words of the codicil, except from the reference to date, but all the circumstances go to shew that the testator intended the will of May, 1866, to be his last will, and that he desired to revive it by the codicil of the 19th of December, 1872. On the other hand, there is no evidence that he intended to revive the codicil of May, 1871. It is obvious that he intended to substitute the new codicil for that. He referred to *In the Goods of May* (1).

SIR J. HANNEN. I entirely agree with what has been said by Dr. Spinks. The codicil of December, 1872, is expressly stated to be a codicil to the will of May, 1866, and there is nothing to shew that the testator did not mean what he said, namely, that it should be a codicil to that will. The result is, that in effect he revived that will. At the same time there is nothing to shew that he also intended to revive the codicil of May, 1871; therefore such codicil is not revived. I decree probate of the will of May, 1866, and the codicil of December, 1872.

Proctor: *E. W. Crosse.*

(1) Law Rep. 1 P. & M. 575.

BRUNT *v.* BRUNT.

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Feb. 11.

Will destroyed by Testator when suffering from Delirium Tremens—Subsequent Recognition of the Act.

The testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out:—

Held, that the will was not revoked.

William Brunt, late of Sidney Street, Commercial Road, Middlesex, publican, died on the 6th of August, 1872, having executed a will bearing date the 22nd of November, 1869, in which he appointed his wife, Jane Gratton Brunt, the plaintiff, sole executrix. By his will he left the whole property to his wife so long as she remained his widow, and in case she died his widow the property was to go to his son William Charles Harry Brunt absolutely; but in case she married again he gave one moiety to her for her separate use, and the other moiety to his son, absolutely. The plaintiff having cited the defendant, the only child of the testator, to enter an appearance, which he did not do, propounded this will in an ordinary declaration. It appeared from the evidence of Dr. Grant, the medical attendant on the deceased, that in the month of October, 1871, he was suffering from delirium tremens, and that whilst under such an attack he was incapable of transacting business, nor was he responsible for his actions; but that after the attack had passed off he could understand and answer questions put to him, and occasionally, but not always, knew the state he had been in. The plaintiff deposed that in the same month of October, at the time Dr. Grant was in attendance upon him, the deceased went up to his bedroom one morning at 2 A.M. very drunk, and opened his iron safe in order to put away the money he had taken during the previous day. That, seeing the will there, he deliberately tore it up into fragments, and threw them on the table, at the same time muttering to himself. That on his leaving the room she collected the pieces together and locked them up, without saying anything to her husband at the time, although she

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afterwards informed him of the fact. It appeared also that in February, 1872, when he was much better, having abstained from drink for some time, in the presence of Mrs. Ives, the plaintiff's sister, the deceased, referring to the destruction of the will, said he must have been insane when he did it, and would make another. At the conclusion of the evidence,

SIR J. HANNEN said: Assuming that the deceased was out of his mind when he destroyed the will, what was the effect of his recognition of the act after the attack had gone off?

Feb. 4. *R. A. Pritchard*, for the plaintiff. In order that a will be duly revoked by tearing, an act and intention must combine at the same moment of time. The act cannot be done at one time, and the intention be formed at another. When deceased tore up his will he was not capable of forming an intention, so that there was no revocation at that period, and it is not material what intention the deceased formed afterwards. Moreover, as the will was duly executed, the presumption is against revocation, which must be proved by the party affirming it. He referred to *Sprigge* v. *Sprigge*. (1)

Cur. adv. vult.

Feb. 12. SIR J. HANNEN. In this case a will was propounded which it was alleged the testator had destroyed when suffering under delirium tremens, that is, when he was insane. The evidence satisfied me that the testator was in an unsound state of mind when he tore up the will; he was suffering from delirium, and therefore not capable of exercising any judgment in the matter. The pieces were collected and put together, so that the will is now restored to the condition in which it was before the destruction. The testator after the recovery of his senses expressed regret at what he had done, and said he would make another will. I am of opinion that under these circumstances there was no revocation of the will by destruction. The act done by the testator can in no sense be considered his act, for he was then out of his mind; so that there has never been anything at all amounting to a revoca-

(1) Law Rep. 1 P. & M. 608.

tion. After his recovery he expressed regret, and proposed to make a fresh will. The circumstances are exactly the same as those in *Borlase* v. *Borlase*. (1) At page 139 Sir H. Jenner Fust says, "The deceased was at the time (of the destruction of the paper) in a state of mental excitement, and insane, and not master of his actions, and consequently not responsible for his act, as if it had been the act of a competent person; and consequently the attempt at destruction, or even the actual destruction of the codicil, by a person in such a state of mind, has no effect. The pieces of the paper were saved and sealed up in an envelope, with a memorandum setting forth the fact of the tearing by the deceased. This attempted destruction, therefore, cannot have the effect of a revocatory act. The deceased is said to have immediately recovered his faculties, and to have expressed regret at the act. I think this is not improbable, looking at the nature of the attacks he was subject to; but whether or not this be so, whether he did recover himself immediately after or not, if at the time of the atttempted destruction he was not of sound mind, the act can have no effect upon the instrument he attempted to destroy; and therefore nothing, it appears to me, can in any way affect the disposition contained in the codicil." I decree probate of the will.

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Proctors: *Pritchard & Sons.*

IN THE GOODS OF MAYER.

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Administration—General Grant to Receiver appointed by Court of Chancery.

Feb. 25.

Proceedings in Chancery having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the Court of Chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the Court of Probate for administration. The widow, and all the next of kin and persons entitled in distribution having been cited, upon their non-appearance to the citation, the Court made a general grant of administration to the receiver.

JOSHUA HEATH MAYER, late of Newcastle-under-Lyme, in the county of Stafford, accountant, died on the 18th of September,

(1) 4 No. of Ca. 106.

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IN THE GOODS OF MAYER.

1872, intestate, leaving Eliza Mayer, his widow, him surviving, and Joshua Heath Mayer, Amy Mayer, and Ada Mayer, his only next of kin, and the only persons entitled in distribution to his personal estate and effects. Joshua Heath Mayer and Thomas Edge were executors of the will of Edward Barker, late of Newcastle-under-Lyme, innkeeper, deceased, and both of them had proved it, but Mayer only had acted. It was alleged that Mayer had possessed himself of personal estate of the testator of considerable value and appropriated it to his own use, and a sum exceeding 300*l.* was claimed to be due from Mayer's estate to Barker's estate. The personal estate of Mayer was believed to be insufficient for the payment of his debts, including this claim, and funeral expenses. On the 6th of November, 1872, Thomas Edge, on behalf of himself and all the creditors of Mayer, filed a bill in Chancery against Eliza Mayer, the widow, and her brother, Herbert Pearce, wherein he alleged inter alia that although Eliza Mayer had not taken out letters of administration to the personal estate and effects of her husband, she and the said Herbert Pearce had collected and got in a considerable portion of the said estate, and that he, Thomas Edge, had applied to the Court of Probate for a grant of administration as a creditor, but the Court had refused his application. On the 14th of November, 1872, an order in the suit was made by Vice-Chancellor Malins, to the following effect:—"That Mr. Thomas Bayley, of Newcastle-under-Lyme, in the county of Stafford, auctioneer, be appointed to collect, get in, and receive the outstanding personal estate of Joshua Heath Mayer, the intestate in the bill named, until the grant of letters of administration to the intestate's effects, with liberty for the said Thomas Bayley to apply for letters of administration. And it was ordered that the defendants, Eliza Mayer and Herbert Pearce, should deliver and pay over to the said Thomas Bayley, on oath, all property and moneys of the intestate, and all books and papers relating to the said outstanding personal estate then in their or either of their possession or power. And that the said Thomas Bayley should from time to time pass his accounts and pay the balances to be certified to be due from him into the Bank, with the privity of the accountant-general, to the credit of this cause, *Edge* v. *Mayer* [1872, E. 62]; and that such balances, when so paid in, be invested in Bank

three pounds per cent. annuities on the like credit, and that the interest as it accrued thereon, and all accumulations of interest, should be invested in like manner on the like credit. And it was ordered that an injunction should be awarded against the defendants until further order from receiving, getting in, or interfering with the personal estate and effects of the said intestate, and from selling, or disposing of, or parting with any part of such personal estate and effects as might be in their, or either of their possession or power, except to such receiver."

Thomas Bayley had since cited Eliza Mayer, the widow, and the said Joshua Heath Mayer, Amy Mayer, and Ada Mayer, to accept or refuse admininistration, or shew cause why it should not be granted to him. The citation had been personally served, and no appearance had been entered.

Searle moved for a grant of administration to the said Thomas Bayley. All the persons entitled to the grant had been cited, and the applicant, having been appointed receiver by the Court of Chancery, would be obliged to administer the estate under the direction of that Court.

SIR J. HANNEN. Although no precedent can be found for such a grant, I think, under the circumstances, it is reasonable to make it. A general grant of administration may issue to Thomas Bayley.

Solicitors: *G. L. P. Eyre & Co.*

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March 4.

IN THE GOODS OF DE LA SAUSSAYE.

Will—Codicils—Further Codicil confirming the Will only, and called the last and deliberate Will.

The testator, by birth a British subject, but domiciled in Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will :—

Held, that the Spanish codicils were not revoked by the last-mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it.

SIR RICHARD DE LA SAUSSAYE, Knight, died on the 27th of October, 1872, having left several testamentary papers, which are set out in the judgment. He was by birth an Irishman, but had become domiciled in Spain; had served in the Spanish army, and attained the rank of field-marshal therein.

Feb. 18. *Dr. Tristram* applied to the Court to determine which of such papers were entitled to be admitted to probate.

Cur. adv. vult.

March 4. SIR J. HANNEN. The deceased in this case left the following testamentary papers: (1) A will made in Spain on the 14th February, 1868. (2) A will duly executed and attested in London on the 12th of March, 1869, whereby he revoked all former wills. (3) A codicil made at Madrid, on the 2nd of July, 1871, whereby he bequeathed to Donna J. Z. de Orduna twenty-five railway debentures, then deposited with bankers at Madrid; and by a further codicil of the same date he appointed a person therein named as his executor, for the sole purpose of carrying into effect the said testamentary disposition, and of seeing to his interment in case of his demise taking place at Madrid. (4) A codicil made at Madrid on the 27th of May, 1872, whereby he bequeathed, independently of all other testamentary dispositions which he had made, or which he might make, thirty railway bonds to Donna B. Damian, and after her death to her son, and in the event of his not surviving his mother, and in certain other contingencies, to the director of the College of Noble Irishmen at Salamanca, for the purposes therein specified; and the testator

appointed simply for the said effects, and for the carrying out of the said dispositions and testament, Senor W. Marmel Diaz, of Barrazan, as his executor. (5) A codicil made at Madrid on the 20th of June, 1872, whereby he reduced the legacy to Donna J. Z. de Orduna of railway debentures from twenty-five to fifteen, and left her a share and a half in a mine, and appointed the said lady his sole executrix only in regard to the wearing apparel, effects, and furniture belonging to the testator, which were to become her property at the period of his demise, in addition to the debentures and the share and half share in the mine. (6) A codicil duly executed and attested in London on the 29th of July, 1872, whereby the testator revoked and annulled all legacies and other testamentary dispositions, of whatever nature, made in his will, executed in London on the 12th of March, 1869, with certain specified exceptions, and left annuities and legacies to various persons. No mention is made in this codicil of the Spanish codicils, or the property with which they dealt. It concludes thus: "I confirm the dispositions contained in my will of the 12th of March, 1869, in whatever does not clash or interfere with the contents of this codicil, which is to be considered as my last and deliberate will and testament, and to be fulfilled accordingly." (7) A further codicil, duly executed and attested in London on the 30th of July, 1872, whereby he bequeathed to Donna J. Z. de Orduna 120*l.* a year for her sole and separate use, independently of her present or any future husband; and he further declares it to be his will that any jewels, watches, &c., which he might die possessed of, and which were not otherwise disposed of, should be given, together with the family plate, and generally all articles in his personal use, to his niece, Mary Orr, absolutely, and he confirmed his former will and codicil in everything not in contradiction to the present. The Spanish codicils are not attested, with the exception of that of the 27th of May, 1872, which is attested by the executor therein named as a witness, and as accepting the office, but it is proved by a Spanish advocate that these codicils are all valid according to the Spanish law; but he adds that he feels inclined to think that the Spanish codicils have lost all their force and efficacy through the posterior execution of the English codicils. It is clear that the mere fact of a testator having executed a testamentary paper of a later date does not of itself invalidate

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an earlier disposition. The question is always one of the intention to be collected from the language of the posterior instrument. Did the testator intend that the later paper should be taken as his final and complete will to the exclusion of all others, or did he mean that it should be taken in conjunction with the previous instruments? If there appears any inconsistency between two papers, this is a certain indication of the testator's intention, and the later must prevail and revokes the former to the extent to which it is inconsistent with it. In the present case, however, there is no such inconsistency. The express revocation contained in the English codicil is confined to certain portions of the will of the 12th of March, 1869, and the only words which can be referred to, from which to imply an intention on the part of the testator to revoke his Spanish codicils, are the concluding words of the English codicils, in which he confirms his will of the 12th of March, 1869, in whatever does not clash or interfere with the contents of the codicil which is to be considered as his last and deliberate will. I am, however, of opinion that this ratification of the will of the 12th of March, 1869, does not affect the Spanish codicils. These codicils must be deemed to be parts of the will, and are themselves confirmed by the ratification of the will of which they were modifications, *Crosbie* v. *Macdoual.* (1) Nor does the fact that the testator speaks of his English codicil as his "last and deliberate will" affect the earlier codicils. Similar words were formerly held to be revocatory of earlier instruments: *Plenty* v. *West* (2); but this case, and others to the same effect (as was pointed out by Lord Penzance in *Lemage* v. *Goodban* (3)) must now be taken to be overruled by *Cutto* v. *Gilbert* (4) and *Stoddart* v. *Grant.* (5) In the present case I can find nothing indicative of an intention to revoke the dispositions of the Spanish codicils, and I therefore pronounce for their admission to probate with the English documents, as together constituting the complete testamentary disposition of the deceased. The probate will, however, only be granted to the executors appointed by the English will.

Attorney: *Norris.*

(1) 4 Ves. 610.
(2) 1 Robert. 264.
(3) Law Rep. 1 P. & M. 57.
(4) 9 Moo. P. C., 131.
(5) 1 Macq. 163.

(3) 5 C 12 Jun 75.82.

IN THE GOODS OF DONALDSON.

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March 4.

Will—Scotch Disposition and Settlement—Probate.

Testator executed a trust disposition and settlement, valid according to the law of Scotland, and applicable to the whole heritable and moveable estate which should belong to him at the time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together form the complete testamentary disposition of the testator. The deceased's domicil was English, but he had a freehold estate in Scotland. The Court granted probate of the will and trust disposition as together containing the will of the deceased.

JOHN DONALDSON, of North Shields, Northumberland, master mariner, died on the 8th of October, 1865, having executed a will, dated the 5th of August, 1865, by which he disposed of all his real and personal estate, whether in England or Scotland. This will was proved in the district registry of Newcastle in August, 1872, by John Donaldson, the son of the deceased and the surviving executor named in it. Up to the year 1820 the deceased was domiciled in Scotland, and was resident at Dundee; but at the time of his death his domicil was English. His personal estate in England was of small value; he was, however, possessed of freehold property situate at Dundee. By a Scotch disposition and settlement, dated the 21st of January, 1851, the deceased conveyed to trustees his whole heritable and moveable property, and gave to them power to sell the same; under which power a part of such property had been sold, and the proceeds of the sale remain in the hands of James Dickson, of Dundee, the surviving trustee named in the deed. He further reserved to himself in this deed a power to alter the same, in whole or in part, and to revoke, cancel, or annul it as he might think proper. This deed was duly registered according to the law of Scotland, in the general registry of saisines situate at Edinburgh, but applicable to the county of Forfar. After the deceased's will had been proved in this country, the probate was sent to Scotland for confirmation by the Commissary Court of Edinburgh, where it was objected that the deceased's will and the said disposition and settlement must be read together as containing the will and final disposition of both the heritable

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and moveable estate, but that the Commissary Court had no power to make a confirmation of the will with such disposition and settlement added or annexed thereto, unless such disposition and settlement were first admitted to probate in England. A Scotch advocate advised that, even if the English will is duly executed according to the law of England, it is ineffectual as a conveyance of the Scotch heritage; and that it does not, by implication, revoke the previous trust disposition in the Scotch form, which effectually conveyed the heritable property in Scotland to the trustee appointed by that instrument. That the trust disposition and the settlement and will must be read together as containing the final testamentary intentions of the testator; the former being good as transmitting the heritable estate to the trustees therein named, and the latter being effectual as a transmission of any personal estate which belonged to the testator at the time of his death, and also as expressive of the trusts under which the Scotch property should be held or applied, and further indicating the testator's intention that the trustees appointed by the English will should supersede those appointed by the trust disposition and settlement, and that it is the duty of the trustees under the Scotch disposition and settlement to convey or pay over to the executor under the English will for the purposes of the will the trust estate in Scotland; and that the English executor, in order to complete his title, should obtain probate of the trust disposition and settlement, and of the English will, as being together the will of the said deceased; and that the executor of the English will would thereby become entitled to give a valid discharge to the Scotch trustee on his conveying the trust estate to the English executor. Mr. Dickson, the surviving trustee under the trust disposition and settlement, is desirous of having a release from such trust estate; and Mr. John Donaldson is willing to execute a discharge to him for the same when he can legally do so.

Feb. 8. *Dr. Spinks, Q.C.*, moved the Court to revoke the probate already granted, and to admit the trust disposition and settlement, together with the will, to probate, as together containing the will of the deceased. He referred to *Lemage* v. *Goodban*. (1)

Cur. adv. vult.
12 Jan 1874

(1) Law Rep. 1 P. & M. 57.

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March 4. SIR J. HANNEN. The deceased, John Donaldson, a native of Scotland, but domiciled in England, died at North Shields on the 8th of October, 1865. By his will, dated the 5th of August, 1865, he disposed of all his real and personal estate, whether in England or Scotland, and appointed his son, John Donaldson, and a person since deceased, his executors. This will was proved by John Donaldson in the district registry of Newcastle-upon-Tyne in August, 1872. The deceased was possessed of a small amount of personal property in England. He was also possessed of freehold property in Scotland. By a Scotch disposition and settlement, dated the 21st of January, 1851, duly executed, and having a testamentary effect by the law of Scotland, the deceased conveyed to James Dickson and other persons since deceased, upon certain trusts, his whole heritable and moveable estate then belonging, or which should belong, to him at the time of his death, with power to the testator at any time of his life to alter the same trusts in whole or in part, and to revoke, cancel, and annul the same as he might think proper. It appears, from the opinion of a Scotch advocate, that the English will is ineffectual as a conveyance of the Scotch heritage, and that it does not revoke the previous trust disposition in the Scotch form, which effectually conveyed the heritable property in Scotland to the trustees appointed by that instrument. Upon the assumption that by the law of Scotland the English will was inoperative upon the Scotch settlement, the complete testamentary dispositions of the deceased are not to be found in the English will alone, but in that instrument construed together with the Scotch settlement; and in this state of things this Court will admit to probate the several instruments which together contain the last will of the testator: *Lemage* v. *Goodban.* (1) I therefore order that the probate of the English will already granted be revoked, and that a re-grant be made of probate of that will, together with the Scotch disposition and settlement, as prayed.

Attorneys: *Hopwood & Sons.*

(1) Law Rep. 1 P. & M. 57. 12 Jur. N. S. 32

1873
March 11.

IN THE GOODS OF SAMSON.

*Will—Executor not resident in England—*20 *&* 21 *Vict. c.* 77, *s.* 73*—Special Circumstances—Administration with Will annexed.*

The Court of Probate cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of the deceased, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit.

CELIA SAMSON of Brussels, widow, died on the 12th of January, 1873, having executed a will dated the 26th of June, 1872, in which she appointed her sons, Barron Samson and Phineas Samson, executors. By this will, with the exception of a legacy of 200*l.*, the whole property was left to be equally divided between the testatrix's children living at the time of her death. The deceased left surviving her two sons and four daughters, of whom Marian Matilda Greenberg, the wife of Simeon Greenberg, and resident at Birmingham, was one. The property of the deceased consists principally of shares and bonds deposited in her own name in the National Bank at Brussels of the value of about 3000*l.*, and of a small amount of property in this country of the value of 200*l.* Barron Samson, one of the executors, has been for some time resident at Brussels, where he carries on the business of a broker. Phineas Samson is resident in Australia. On application being made for probate of the will of the deceased on behalf of Barron Samson, it was found that a caveat had been entered on behalf of Marian Matilda Greenberg, and notice was given that an application would be made to the Court to grant to her administration with the will annexed of the goods of the deceased under 20 & 21 Vict. c. 77, s. 73. Affidavits were filed, in which it was alleged that Barron Samson had left Birmingham many years ago in embarrassed circumstances, and without having paid his debts, and generally that he was not a fit and proper person to be entrusted with the estate of the deceased, but the facts were denied or explained on oath by Barron Samson.

Inderwick moved the Court on the affidavits to grant the administration to Mrs. Greenberg. The 20 & 21 Vict. c. 77, s. 73, authorizes

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such a grant, because the executor is not resident in this country, and there are special circumstances, namely, that the executor has no apparent business or profession, and has not paid the debts he incurred in this country. He cited *In the Goods of Cooke* (1); *In the Goods of Keane.* (2) If the executor will offer some respectable person as a guarantor for the due distribution of the estate, the opposition will be withdrawn.

Searle, for the executor. Before the passing of 20 & 21 Vict., c. 77, the Court of Probate could not refuse to grant probate to an executor on account of his poverty or insolvency: Williams' Executors (4th ed.) pt. 1, bk. 3, ch. 1, p. 192; and that Act was only intended to apply to executors who were not willing or competent to take probate, and therefore it was necessary or convenient to grant administration to another person. The charges made against the executor are of old date, and are disproved. He cited *Smethurst* v. *Tomlin* (3); *In the Goods of Cooper.* (4)

SIR J. HANNEN. I am of opinion that the application must be refused. I was anxious to have the assistance of counsel in considering the proper effect to be given to the 73rd section of the Probate Act. I think it right to say that I am of opinion that I have power to make the order which I am asked to make in the state of circumstances existing in this case; but it seems to me that it is by an accident, as it were, I have that power. The 73rd section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this Court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate of the deceased or other special circumstances. This provision gives me power, where the executor is resident out of the country, if I think he is, by reason of his position there or his

(1) 1 Sw. & Tr. 267; 28 L. J. (P. M. & A.) 43.

(2) 1 Sw. & Tr. 265; 28 L. J. (P. M. & A.) 34.

(3) 2 Sw. & Tr. 143; 30 L. J. (P. M. & A.) 269.

(4) Law Rep. 2 P. & M. 21.

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bad character, unfitted to act, to exercise a discretion, and refuse him the appointment. But it is plain I must not, merely because the executor is out of the country at the time of testator's death, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so. The executor's appointment is derived from the will. It is the intention of the deceased that that particular person shall have control over his property after death; and although in certain cases the section empowers me to give another person such control, unless the legislature thinks proper to arm me with a general power I ought not to assume it. The will in this case is the will of the mother made by her in 1872, years after the transactions took place which are referred to in the affidavits, and the character and circumstances of which could not have been unknown to her. Nevertheless she has thought fit to entrust the management of her affairs to her son. I am asked by some members of the family to try the character of the son on charges of ancient date and of a conflicting nature, and which have been contradicted by himself. Even assuming the truth of the statements made against him, there is nothing to shew that he has not for years past reformed, and down to the present time led a respectable life. I cannot on those affidavits come to the conclusion that he is an unfit person to take the grant or unworthy to have the control of the property which his mother has given him. As this was an experimental application and without foundation, it must be refused with costs.

Attorney for plaintiff: *W. H. Reece.*
Attorneys for defendant: *Boulton & Sons.*

March 18.

IN THE GOODS OF IHLER.

Administration—Widow or Next of Kin—Judicial Separation by reason of Cruelty of Wife.

The Court will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate.

JOHN CRICHTON IHLER, of Ashburnham Road, Greenwich, Kent, died on the 15th of January, 1873, intestate, leaving him surviving

his widow, Charlotte Barker Ihler, and two daughters, the only persons entitled to his personal estate. Mr. Ihler and his wife lived together until the year 1864, but in that year they separated, the husband making his wife an allowance. In the year 1865, Mrs. Ihler filed a petition in the Court for Divorce for a restitution of conjugal rights, to which the deceased appeared, and pleaded his wife's cruelty, and prayed for a judicial separation by reason thereof. The case was heard before Sir James Wilde, J.O., in June, 1865, and on the 23rd of June, he made a decree of judicial separation between the parties on the ground of Mrs. Ihler's cruelty to her husband, and ordered him to pay *her* for her maintenance 1*l.* a week, which he continued to do until his death.

March 11. *Dr. Middleton* moved the Court to grant administration to Charlotte Bowman Ihler, the eldest daughter, passing over the widow. Although that is usually done for immorality only, still it would seem reasonable it should be done wherever the parties are living separate from the fault of the widow, *Lambell* v. *Lambell.* (1) If the wife had obtained such a decree, the husband would have not only been deprived of the administration of her property on her death, but of all interest in the property itself (20 & 21 Vict. c. 75, s. 25).

Cur. adv. vult.

MARCH 18. SIR J. HANNEN. In this case I was asked to pass over the widow, and to grant administration to one of the children, on the ground that during the husband's lifetime a decree of judicial separation, by reason of cruelty, had been pronounced against the wife. It is sufficient for me to say that I cannot pass her over on that ground without giving her an opportunity of showing cause against the application. At the present moment I am disposed to think that there is no sufficient reason why the widow should be passed over, in as much as she has not done anything by which her honesty can be called in question. At any rate I shall give her an opportunity to be heard. I direct that she be cited.

Attorney: *J. P. Biggenden.*

(1) 3 Hagg. Eccl. 568.

1873
Dec. 13.

KEANE *v.* KEANE.

Matrimonial Suit—Costs of Wife—Stay of Proceedings until Payment.

The respondent having obtained an order upon the petitioner to pay to her or her attorney a certain amount of taxed costs, endeavoured to enforce such order by a writ of fi. fa., but failed in recovering them. The Court ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by the petitioner, but would not extend the order to the expenses incurred in the suing out and execution of the writ of fi. fa.

This was a suit for restitution of conjugal rights brought by the husband against his wife. She appeared and filed an answer, in which she prayed for a judicial separation. On the 28th of February, 1872, the questions at issue were directed to be tried before the Court itself. On the 16th of April, 1872, an order was made upon the petitioner to pay to the respondent or her solicitor the sum of 14*l.* 9*s.*, being her taxed costs up to that period, and on the 30th of April, 1872, a further order was made that the petitioner should pay into the registry 65*l.* to cover the respondent's costs of hearing, or that he should give security to the same amount, and that the proceedings should be stayed until the order was complied with. The petitioner gave security in obedience to this order. On the 10th of May, 1872, the respondent applied for and obtained a writ of fi. fa. against the petitioner for the recovery of her costs, but on an attempt being made to levy upon the goods of the petitioner, two bills of sale were brought to the notice of the sheriff and he withdrew and made a return accordingly.

Nov. 26. *Dr. Spinks, Q.C.*, moved for an order that the proceedings on the petition be suspended until the costs, 14*l.* 9*s.*, the expense of obtaining the writ of fi. fa., the sheriff's charges, and interest, be first paid.

Tatham appeared for the petitioner.

Cur. adv. vult.

Dec. 13. The Judge Ordinary. This was an application for an order that the proceedings should be stayed until certain costs, 14*l.* 9*s.*, and other expenses, should be paid. Dr. Spinks argued in support of the application, that it was the universal practice of the

Court, that the wife was entitled to payment of her costs, and if they were not paid she had a right to a stay of proceedings. I was certainly unwilling to apply that rule to the extent asked; but on an examination of the authorities I find that they bear out Dr. Spinks's proposition, and I am bound to conform to the practice of the Court. I therefore must grant the application. In *Chichester* v. *Mure* (1) the Judge Ordinary said, "It was the practice of the ecclesiastical courts, when an order for the payment by the husband of alimony or costs had been made, not to appoint a day for the hearing until the order had been obeyed." This is a direct authority in support of the application. But I do not order a stay of proceedings until the payment of any other costs than the sum of 14*l.* 9*s.* As to the expenses incurred by the wife in her endeavour to obtain another remedy, I do not consider that I ought to impose upon the husband the penalty of not being allowed to proceed until those incidental expenses are paid. The ordinary course must be followed as to them; a summons must be taken out, and it must be established to the satisfaction of the Court that the petitioner has the means of paying before he can be punished for not doing so. The respondent is entitled to the costs to which she has been put in order to bring her case to a hearing, and to establish her rights by litigation. The costs of this application will also be included.

Attorneys for petitioner: *Prior & Co.*
Attorneys for respondent: *Tippetts & Son.*

NICHOLSON *v.* NICHOLSON.

Jan. 23.

*Dissolution of Marriage—Unreasonable Delay—Two Years—*20 & 21 *Vict. c.* 75, *s.* 31.

If a petitioner, with a full knowledge of the facts of the case, does not present his petition for two years, he must give some sufficient reason for the delay, otherwise his petition may be dismissed under 20 & 21 Vict. c. 75, s. 31.

IN this case Sarah Ann Nicholson presented a petition to the Court praying for a dissolution of her marriage with John Nichol-

(1) 3 Sw. & Tr. 223; 32 L. J. (P. M. & A.) 120.

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son, by reason of his adultery and cruelty. The marriage took place on the 16th of March, 1857. The cruelty was alleged and proved to have been committed between June, 1857, and April, 1868, when the respondent left the petitioner. The adultery was charged between December, 1865, and June, 1867, and in April, 1868. The petition was dated the 21st of February, 1872.

At the close of the evidence the Judge Ordinary inquired what explanation could be given of the delay which had taken place in presenting the petition.

R. A. Pritchard, for the petitioner. The petitioner was in service with Dr. Woodhead from January, 1865, until January, 1869, at the ordinary wages. Since then she has kept lodgings, but had had to purchase furniture to enable her to do so, and could not now have instituted proceedings without pecuniary aid from her attorney.

THE JUDGE ORDINARY. Since she left service there has been a delay of more than two years. It cannot be allowed that parties shall wait an indefinite time before they commence proceedings in this Court. If they do, they must negative the idea that the delay is improper. In order to explain the lapse of time in this case it is said that the petitioner took a house and that she had to furnish it before she could obtain a living from it. It is not without hesitation that I accept this excuse. I cannot adopt the proposition that a lapse of two years can be permitted without explanation. As to other cases, I must draw my own inference from the circumstances of each case. If I can see that a delay of two years has occurred because the petitioner was content to let things be I shall dismiss the petition. In this case, having taken a house, the petitioner may have waited until she felt her position secured. I am anxious to impress upon the practitioners the view I take on this point, so that they may be fairly warned for the future. Decree nisi with costs.

Proctor: *Ayrton.*

POWELL *v.* POWELL AND JONES.

1873
June 17.

Matrimonial Suit—Alimony pendente Lite—Allowance under Separation Deed.

Under a deed of separation executed by the parties many years previously, the husband had covenanted to pay an annuity to his wife in accordance with the amount of his income at that period, which annuity he had continued to pay up to the present time. He subsequently acquired a very large increase of fortune, and finally instituted a suit in this Court to dissolve his marriage by reason of the adultery of his wife:—

Held, that the wife had no claim to alimony pending suit estimated on the present income of her husband.

THIS was a suit instituted by David Jeffreys Powell against his wife Margaret Jeffreys Powell, by reason of her adultery with Thomas Jones. On the 9th of December, 1872, the respondent filed a petition for alimony in which she alleged that her husband had an income of 3000*l.* from real estate and personal property to the value of 50,000*l.* In his answer the petitioner admitted a net income of 1400*l.* from realty and 300*l.* from personal estate, but he further stated that in the year 1862 he and the respondent had agreed to live separate and apart, and that by a deed of separation dated the 6th of September, 1862, and duly executed, he had covenanted to make a certain annual allowance to the respondent. That from the date of such deed and in pursuance of its covenants he and his wife had continued to live separate, and he had continued and was willing to continue to pay to her the annual allowance as in and by the deed agreed upon; and he submitted that he ought not to be ordered to make her any further allowance than as by the said deed provided. The respondent replied that under the deed she was only entitled to an annual allowance of 40*l.*, and that at the date of the deed the petitioner's income only amounted to 210*l.* per annum. That she was not then aware that her husband would succeed to the property which he now possesses, and of which he became possessed in February, 1869.

June 10. *Dr. Spinks, Q.C.*, and *Dr. Swabey*, appeared for the respondent.

Bayford, for the petitioner.

Cur. adv. vult.

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POWELL v. POWELL.

June 17. THE JUDGE ORDINARY. This was a motion for alimony pending suit. It seems that the husband and wife had been living apart for a great number of years, and that in 1862 the petitioner covenanted to pay the respondent an annuity of 40*l.*, which he has continued to do until the present time. The husband having instituted a suit for a dissolution of marriage on the ground of his wife's adultery, she filed a petition in which she claims alimony on the basis of her husband's actual present income. It appears that since the agreement the husband has acquired a considerable accession of fortune, and it is argued that, if so, the wife is entitled to a larger annuity than 40*l.* per annum, and under ordinary circumstances that would be so. I think, however, I should make no order in this case. Ever since 1862 the wife has been content to live on 40*l.* per annum, and if a wife is content to live on a small income for many years, it would be very unfair on the husband that on her being accused of committing adultery she could at once be entitled to a higher rate of allowance than she had previously received. The course I am inclined to take in this case has already received judicial approval in *George* v. *George* (1). In that case the learned judge said, "In this case the parties have been long living separate; the wife is in service, and is able to support herself, and if I were to allot her alimony pendente lite, the result would be that, because there is a matrimonial dispute and she has instituted a suit against her husband for relief, she would be placed in a better position than she was in before the suit was instituted." The facts of this case give an additional force to those observations, for the wife has been content with the allowance made by her husband, and has taken no steps to increase it until he had actually charged her with adultery. I do not say that the receipt of 40*l.* per annum under the agreement would preclude her from asking the Court for a larger allowance under certain contingencies which might arise in the progress of this suit, but at present I refuse her application.

Attorneys for petitioner: *Dobinson & Geare.*
Attorneys for respondent: *Field, Roscoe, & Co.*

(1) Law Rep. 1 P. & M. 553, 555.

CLARKE *v.* CLARKE AND CLARKE. 1873 June 17.

Matrimonial Suit—Co-respondent condemned in Costs—Charging Order on Money in Funds—1 & 2 Vict. c. 110.

The 20 & 21 Vict. c. 85, s. 52, does not transfer to the Court for Divorce the powers of the Court of Chancery, which are ancillary to the enforcement of its decrees, but only those ordinary powers which are necessary for the direct enforcement of them, such as writs of execution and process in contempt. Hence, the power given to the Court of Chancery by 1 & 2 Vict. c. 110, ss. 14 and 18, on the application of a judgment creditor to make a charging order on stock standing in the name of, or beneficially belonging to, the judgment debtor, cannot be exercised by the judge of the Court for Divorce.

2 L.D. 23.

THIS was originally a suit for dissolution of marriage, by reason of the adultery of the respondent and co-respondent. The adultery having been proved, the marriage was dissolved, with costs against the co-respondent. This decree was made in March, 1865, and in June, 1867, the costs were taxed at 166*l.* 16*s.* 1*d.* On the 25th of April, 1873, an order was made by the Court directing the co-respondent to pay the taxed costs to the petitioner or his solicitor within a limited time; but this order has never been obeyed. The co-respondent is beneficially interested in an eighth share of a sum of 8967*l.* 3*s.* 9*d.* new three per cent. annuities, standing in the books of the Bank of England in the names of the Rev. H. Bennett, Henry Hill, and Arthur Hill.

May 27. *Inderwick,* for the petitioner, applied to the Court to issue an order to charge the share of the co-respondent in the above-mentioned three per cent. annuities, or in so much of them as might be necessary, with the payment of such costs. By 20 & 21 Vict. c. 85, s. 52, all decrees and orders to be made by the Court in any suit or petition shall be enforced and put in execution in the same or like manner as judgments, orders, or decrees of the High Court of Chancery could be enforced and put in execution. But the Court of Chancery is in the constant habit of making charging orders to enforce its own decrees, under 1 & 2 Vict. c. 110, ss. 14 and 18. The case of *Pratt* v. *Bull* (1), has no application to these sections, but to s. 13.

(1) 4 Giff. 117; 1 D. J. & S. 141; 32 L. J. (Ch.) 21, 144.

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[He referred to *Miles* v. *Presland* (1); *Stanley* v. *Bond* (2); *Westby* v. *Westby* (3); *Chadwick* v. *Holt* (4); *Crispin* v. *Cumano*. (5)]

Cur. adv. vult.

June 17. THE JUDGE ORDINARY. On the 18th of March, 1865, a decree was made by Lord Penzance, condemning the co-respondent in the costs of the petitioner, which were thereby directed to be taxed. On the 22nd of June, 1867, the costs were taxed at 166*l.* 16*s.* 1*d.* On the 25th of April, 1873, an order was made by the Court, directing the co-respondent to pay the same to the petitioner or his solicitor, within a time limited by the order. This has never been complied with. The co-respondent is beneficially interested to the extent of one-eighth share in a sum of 8967*l.* 3*s.* 9*d.* new three per cent. annuities, now standing in the books of the Bank of England in the names of the Rev. H. Bennett, Henry Hill, and Arthur Hill. Application was made to me on the 13th of May for an order under 1 & 2 Vict. c. 110, to charge the share of the co-respondent in the said sum, or so much thereof as might be necessary, with the payment of the said costs. I made an order nisi, against which no cause was shewn, but I thought it necessary to take time to consider whether the order should be made absolute, as the question whether or not this Court has the power to make charging orders under 1 & 2 Vict. c. 110, appeared to me to be doubtful. The jurisdiction of the Court in this matter ultimately depends on the construction to be put on 20 & 21 Vict. c. 85, s. 52, which enacts that "all decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution." It becomes necessary in the first place, to consider in what manner the orders of the Court of Chancery could be enforced and put in execution. By 1 & 2 Vict. c. 110, s. 14, power is given to a judge of one of the superior courts at Westminster, on the application of any judgment creditor, to order that

(1) 4 M. & C. 431.
(2) 7 Beav. 386; 8 Beav. 50.
(3) 5 De G. & Sm. 516.
(4) 8 D. M. & G. 584; 26 L. J. (Ch.) 76.
(5) Law Rep. 1 P. & M. 622.

stock standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, shall stand charged with the payment of the amount for which judgment shall have been recovered. It was held in the case of *Miles* v. *Presland* (1) that a judge of the Court of Chancery had not power under this section to make a charging order for the amount of a judgment signed against the defendant in the Court of Exchequer. I think that the observation of Mr. Inderwick on this case was well founded, that it decided no more than that a judge of the Court of Chancery has not the power of a judge of one of the superior courts at Westminster to make an order in respect of judgments obtained in other courts, but that it leaves unaffected the power of a judge of the Court of Chancery to make charging orders in respect of judgments or decrees of the Court of Chancery. This depends on 1 & 2 Vict. c. 110, s. 18. By that section it is enacted that all decrees and orders of the courts of equity whereby any sum of money or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of the Act, and all powers thereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses are, by such orders or rules respectively, directed to be paid." Under these provisions the courts of equity have frequently made charging orders in respect of their own decrees: *Stanley* v. *Bond* (2); *Westby* v. *Westby* (3), and in the case of *Chadwick* v. *Holt* (4), it was held by the Lords Justices that where a party had merely obtained an order for payment of what should be found due to him upon an account to be taken, he was not entitled to a charging order under s. 18, but no doubt was expressed that if it had been an absolute order for the payment of

(1) 4 My. & Cr. 431.

(2) 7 Beav. 386; 8 Beav. 50.

(3) 5 De G. & Sm. 516.

(4) 8 D. M. & G. 584; 26 L. J. (Ch.) 76.

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money it would have been within the power of the Court of Chancery to make the charging order. Assuming, therefore, that a court of equity can make a charging order under s. 18, in respect of its own decrees, can this Court do so? This seems to turn upon the question whether the making of a charging order is a power for the enforcement of the order to pay costs. The case of *Pratt* v. *Bull* (1), has been treated as an authority on this point. It was there held by Stuart, V.C., and on appeal, by the Lord Chancellor, Lord Westbury, that an order of the Court of Probate directing the payment of a sum of money does not, by being registered with the senior Master of the Court of Common Pleas, constitute a valid charge on land. That case arose upon the 25th section of the Probate Act, 1857 (20 & 21 Vict. c. 77), which enacts that "the Court of Probate shall have the like powers, jurisdiction, and authority generally for enforcing all orders, decrees, and judgments made or given by the Court under the Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such court." It will be seen that the language of this section is much more general and comprehensive than that of 20 & 21 Vict. c. 85, s. 52. The case also turned on the construction, not of the 18th, but of the 13th section of 1 & 2 Vict. c. 110. By that section it is enacted that a judgment already entered up or to be thereafter entered up against any person in any of Her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, &c., of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be possessed or entitled to beneficially, and the judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this Act as he would be entitled to in case the person against whom judgment shall have been entered had power to charge the same hereditaments, and had by writing agreed to charge the same, with the amount of the judgment. Stuart, V.C., pointed out the distinction between the effect of the judgment and the power of enforcing it. "That statute" (20 & 21 Vict. c. 77, s. 25), he says, "in plain language gives to the Court

(1) 4 Giff. 117; 1 D. J. & S. 141; 32 L. J. (Ch.) 21, 144.

of Probate only authority to enforce its own orders in the same manner as the orders of this Court can be enforced, by writs of execution, or in such other lawful manner as will not be inconsistent with the practice of this Court. But the power of enforcing an order is one thing, and the force and effect of an order are another; and if I am asked to construe the clause which relates to the power of enforcing the orders of the Court of Probate as meaning that its orders shall have the same force and effect as judgments of a superior court of law and decrees and orders of this Court, I must say that I find no language or authority to enable me to do so." And Lord Westbury says: "The enactment gives to the creditor, in respect of his judgment, the character and right of an incumbrancer by contract on any interest which the debtor may have on real estate. The object of the enactment was to enable the judgment creditor to attach and realise, by a suit in equity, such estates and interests of his debtor as could not be extended under a writ of elegit. It gives a new right to the judgment creditor, to be prosecuted by a new suit in a court of equity; but the charge and the right of suit to enforce it cannot be called, with any propriety of language, part of the power of the Court by which the judgment or decree was made for enforcing such decree or judgment. If it be so called, then a suit in equity to have the benefit of a charge created by a judgment of the Court of Queen's Bench becomes part of the process, jurisdiction, and authority of the last-mentioned Court. Nor can the new suit that may be brought, or the decree, be denominated part of the power, jurisdiction, or authority of the Court of Equity for enforcing that decree, which words are the appropriate language for denoting the means which the Court has of giving effect to its decrees, namely, processes of execution of various kinds." These passages relate to 1 & 2 Vict. c. 110, s. 13, which does not require that the Court, to whose judgment the effect of a charge on land is attributed, shall do anything more than give the judgment in order to obtain this effect; whereas, by the 14th and 18th sections, it is necessary that the Court of Chancery shall make a charging order before its judgments can operate as a charge on stock. But this distinction does not appear to me to warrant the inference that it was intended by the 25th section of the Probate Act that the orders of the Court

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of Probate should be capable of being made a charge on stock while they are incapable of becoming a charge on land; and it is clear that the reasoning of Lord Westbury leads to the conclusion that the 25th section of the Court of Probate (and, à fortiori, 20 & 21 Vict. c. 85, s. 52) was not intended to transfer to the Court of Probate the powers of the Court of Chancery, which are ancillary to the enforcement of its decrees, but only those powers which are necessary for the direct enforcement of them. This is made, if possible, plainer by the concluding passage of the judgment of Lord Westbury: "I am of opinion, for the reasons already stated, that the charge and right of suit in equity given by the statute to the persons who obtain decrees of the High Court of Chancery cannot in any way be treated as part of the powers, jurisdiction, and authority of the Court of Chancery for enforcing its decrees; and that these words in the 25th section of the Probate Act denote only the ordinary powers of enforcing decrees by writs of execution and process in contempt." The observations of Lord Penzance, in *Crispin* v. *Cumano* (1), shew that he considered the decision of *Pratt* v. *Bull* (2) a binding authority on him, and to preclude him from making a charging order under 20 & 21 Vict. c. 77, s. 25. Additional force is given to this submission to the authority of *Pratt* v. *Bull* (2) by the fact that Lord Penzance was clearly disposed, but for that case, to give a larger operation to the 25th section of the Probate Act. "I should have thought," he says, "that when the legislature declared its intention that the Court of Probate should have the like powers and authority as the Courts of Equity for the enforcing of its decrees and orders, it designed to include therein the power of making orders which should be of the like efficacy, attended with the same incidents, and followed by the same legal results as those of the Courts whose powers and authority formed the standard to which it was to be assimilated; and this design I should have thought might have been well conveyed in the very general language employed in s. 25 of the statute, notwithstanding that, by a very close adherence to the precise terms employed, it was quite possible to infer a distinction between the power of the Court in making an order, and the legal conse-

(1) Law Rep. 1 P. & M. 622, at p. 626.
(2) 4 Giff. 117; 32 L. J. (Ch.) 21, 144.

quences of that order when made. These views, however, must now be taken as incorrect, for the matter has now received judicial consideration and decision in the Court of Chancery. The case of *Pratt* v. *Bull* (1) is a direct authority, as it seems to me, on the point, and the decision of the very eminent judge by whom the case was determined must be held decisive." I have been furnished by Mr. Cooper with a note of a case of *Hyde* v. *Hyde* (2), which was heard in July, 1863, before Sir C. Cresswell, in which that learned judge distinctly held that he had not authority under 20 & 21 Vict. c. 85, s. 52, to make a charging order. This judgment seems to have proceeded on the assumption that Courts of Equity have not power to make charging orders upon their own decrees, in which case it would, of course, follow that the Courts of Probate and Divorce have not. I have already stated that this assumption appears to me unfounded. The case of *Hyde* v. *Hyde* (2), therefore, does not add to the weight of authority upon the point. Mr. Cooper has also referred me to the case of *Re Connell* (3), in which the effect of similar words to those used in 20 & 21 Vict. c. 85, s. 52, was considered. By s. 95 of the Joint Stock Companies Winding-up Act, 1848, it is enacted, "That all orders of the master under the Act shall be enforced in the same manner and by the same or any such process as orders of the Court made in any suit pending therein against any party thereto." An order had been made on a contributory, whereby she became liable to pay 5250*l.* to the official manager. The contributory had shares in an insurance company. An application was made to Crompton, J., for a charging order upon these shares, which he refused to make on the ground that the application ought to have been made to a Court of Equity. Stuart, V.C., afterwards made the order. It is to be observed, however, that all the proceedings under the Joint Stock Companies Winding-up Act, 1848, are to be taken before the Court of Chancery. The master is the officer of the Court to whom the matter of winding up a company is to be referred (s. 14), and he is in the first instance to make certain orders, but subject to an appeal to the Lord Chancellor. The effect of the Act is that the jurisdiction of the Court of Chancery in winding up

(1) 4 Giff. 117; 1 D. J. & S. 141; 32 L. J. (Ch.) 21, 144.

(2) Not reported.

(3) 25 L. J. (Ch.) 649.

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is to be exercised, as to certain matters, by the master, subject to the control of the Court. He acts as the officer of the Court. The question, therefore, in the *Connell Case* (1) was, whether an order made in a matter within the jurisdiction of the Court of Chancery by its own officer was to be deemed an order in respect of which the Court was entitled to exercise the charging power belonging to it in respect of its ordinary decrees. The Court did not derive its power through the 95th section, but directly from the statute 1 & 2 Vict. c. 110, and the 95th section only assisted the argument that the Court of Chancery was entitled to exercise the charging power in respect of orders under the Winding-up Act, as well as orders in ordinary suits. The language of the 95th section, therefore, though similar to that of 20 & 21 Vict. c. 85, s. 52, has reference to such widely different matter that it cannot serve as a safe guide to the meaning of the legislature in the latter statute, and in no case would the earlier decision of Stuart, V.C., in the *Connell Case* (2), weaken the authority of the opinion of the same judge on a later occasion confirmed by the Lord Chancellor. I am, therefore, of opinion that I am bound by the decisions referred to to hold that I have not the power to make a charging order, and the order nisi already obtained must be discharged.

Attorneys for petitioner: *Prior & Co.*

April 22.

BOUGHTON AND MARSTON *v.* KNIGHT AND OTHERS.

Testamentary Suit—Capacity—Delusions in Reference to the Conduct of Children —Will pronounced against—Executor's Costs—Practice.

14 Ch D. 680

A man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shewn to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury, in determining whether or

(1) 25 L. J. (Ch.) 649.

not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it.

Primâ facie, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will be pronounced against.

THE plaintiffs, Sir Charles Boughton and Mr. Marston, propounded the will of John Knight of Henley Hall, Shropshire, dated the 27th of January, 1869. The deceased died on the 7th of September, 1872. The defendants, the sons of the deceased, pleaded that the deceased was not of sound mind, memory, and understanding on the 27th of January, 1869, the day the will bears date. Issue was joined on this plea. The property of the deceased consisted of the Henley Hall estate, the net rental value of which was 1500*l.* per annum, and personalty to the value of 62,000*l.* By the will propounded Sir Charles Boughton and his sons were the devisees of the whole real estate; the testator's son, James Thomas, had a legacy of 8000*l.*, his son Charles 7000*l.*, and John a life interest in 10,000*l.* The children of his deceased daughter, Henrietta Kent, were not mentioned in the will.

The trial extended over fourteen days in March, 1872, before Sir J. Hannen and a special jury.

Parry, Serjt., Day, Q.C., and *Inderwick*, appeared for the plaintiffs.

Sir J. B. Karslake, Q.C., H. Lloyd, Q.C., Dr. Swabey, and *C. A. Middleton*, appeared for the defendants.

March 31. SIR J. HANNEN, in summing up, made the following observations on the subject of testamentary capacity: The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will on the 27th of January, 1869, was of sound mind, memory, and understanding. In one sense, the first phrase, *sound mind*, covers the whole subject; but emphasis is laid upon two particular functions of the mind, which must be sound in order to create a capacity for the making a will; there must be a memory to recall the several persons who may be fitting objects of the

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testator's bounty, and an understanding to comprehend their relationship to himself and their claim upon him. But for convenience the phrase "sound mind" may be adopted, and it is the one I shall make use of throughout my observations. Now you will naturally expect from me a definition, or at any rate an explanation of the legal meaning of the words "sound mind," and I will endeavour to give you such assistance as I am able, either from my own reflections on the subject, or by the aid of what has been said by other judges whose duty it has been to consider this important question before me. I must commence, however, by telling you what these words do not mean. They do not mean a perfectly balanced mind. If so, which of us would be competent to make a will? Such a mind would be free from all influence of prejudice, passion, and pride. But the law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean, or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this, to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills in a vast majority of cases depends upon such nice and fine distinctions, that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England every one is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued. In this respect the law of England differs from that of other countries. It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history, and future prospects of their children or other relatives may demand, and we must remember that we are here to administer the law of England, and we must not attempt to correct its application in a particular case by knowingly deviating from it. I have

said that we have to take care that effect is given to the expression of the true mind of the testator, and that of course involves a consideration of what is the amount and quantity of intellect which is requisite to constitute testamentary capacity. I desire particularly now, and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question, one in which the good sense of men of the world is called into action, and that it does not depend solely on scientific or legal definition. It is a question of degree to be solved in each particular case by those gentlemen who fulfil the office which you have now imposed on you, and on this point for accuracy I should wish to quote the words themselves of Lord Cranworth in *Boyse* v. *Rossborough*. (1) "On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted the ties of domestic life, or if, unhappily, they have been severed, a wide deviation from the ordinary type may be expected, and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours a still wider divergence from the ordinary type may be expected; we must not easily assume that because a man indulges his humours in unaccustomed ways that he is therefore of unsound mind. We must apply some other test than whether or not the man is very different from other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this: Was the man labouring under delusion? If he laboured under delusion,

(1) 6 H. L. C. at p. 45. 3 Jur. N.S. 376

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then to some extent his mind must be unsound. But though we have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, What is a delusion? On this subject an eminent judge who formerly presided in the Court, the jurisdiction of which is now exercised here, Sir J. Nicholl, in the famous case of *Dew* v. *Clark and Clark* (1) says: "One of the counsel (Dr. Lushington) accurately expressed it; it is only the belief of facts which no rational person would have believed that is insane delusion." Gentlemen, in one sense, that is arguing in a circle, for, in fact, it is only saying that a man is not rational who believes what no rational man would believe; but for practical purposes, it is a sufficient definition of a delusion, for this reason—that you must remember that the tribunal that is to determine the question (whether judge or jury), must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing, and therefore the man who does believe it is insane. Nay, more; you must not say, I should not have believed such and such a thing, therefore the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it: Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane. Sir J. Nicholl, in another passage (2), gives what appears to me to be a more logical and precise definition of what a delusion is. He says, "The true criterion, the true test, of the absence or presence of insanity I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, delusion. Wherever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination, and wherever at the same time, having once so conceived, he is incapable of being, or at least of being permanently reasoned out of that conception,

(1) Reported by Haggard, London, 1826, at p. 7; 3 Add. Eccl. 79.
(2) 3 Add. p. 90.

such a patient is said to be under a delusion in a peculiar half technical sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity to be almost, if not altogether, convertible terms, so that a patient under a delusion, so understood, on any subject or subjects in any degree is, for that reason, essentially mad or insane on such subject or subjects in that degree." I believe you will find that that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Now, gentlemen, of course there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experience in this Court. Take the case of Mrs. Thwaites (*Smith* v. *Tebbitt* (1)). If a woman believes that she is one of the persons of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question no doubt arises where the nature of the delusion which is said to exist is this,—when it is alleged that a totally false, unfounded, unreasonable, because unreasoning, estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown that parents—and in justice to women I am bound to say it is more frequently the case with fathers than mothers,—that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them injury or deprive them of advantages which most men desire above all things to confer upon their children. I say there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind. Fortunately the case is rare. It is almost unexampled that a delusion consisting solely of aversion to children

(1) Law Rep. 1 P. & M. 398.

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is manifested without other signs which may be relied on to assist one in forming an opinion on that point. Perhaps the case which most nearly approaches such an one was *Dew* v. *Clark and Clark*. (1) In that case there were indeed some minor matters which were adverted to by the judge in giving his judgment, but he passed over them naturally lightly. For instance, there was the fact that the testator, who had practised medical electricity, attached extraordinary importance to that means of cure in medical practice. He conceived that it might be applied to every purpose, amongst the rest even to the assisting of women in childbirth. But these were passed over, although not cast aside altogether by the learned judge, as not entering into the basis of his judgment. What he did rely upon was a long persistent dislike of his only child, an only daughter, who, upon the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father entertained, so far as his nature would allow, the warmest affection; but it broke out in the most extraordinary form, he desired that his child's mind should be subjected entirely to his own, that she should make her nature known to him, and confess her faults, which of course a human being can only do to its maker; and because the child did not fulfil his desires and hopes in that respect, he treated her as a reprobate and an outcast. In her youth he treated her with great cruelty. He beat her, he used unaccustomed forms of punishment, and he continued throughout his life to treat her as if she were the worst, instead of apparently one of the best of women. In the end, he left her indeed a sum of money sufficient to save her from actual want, if she had needed it; but, in fact, she did not need it. She was well married to a person perfectly able to support her, and it might have been argued that he was content to leave her to a fortune which she had secured by a happy marriage. He was not content to leave her so. He bequeathed to her a sum of money which would have been sufficient, in case her husband had fallen into poverty, to save her from actual want, and the rest of his property he left not to strangers or charities, but to two of his nephews. He was a man who throughout life had presented to those who met him in the ordinary way of business or the ordinary inter-

(1) Reported by Haggard, London, 1826; 3 Add. Eccl. 79.

course of life the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals and learning all that could be learned there, and he amassed a large fortune, considering what he commenced with, some 25,000*l.* or 30,000*l.*, by the practice of his profession. Yet, upon the ground I have mentioned, that the dislike he had conceived for his child had reached such a point that it could only be attributed to mental unsoundness, the will so made in favour of the nephews was set aside, and the law was left to distribute his property without reference to his will. I have said that one usually has other facts before one beside the bare circumstance of a father conceiving a dislike for a child, by which to estimate whether such dislike were rational or irrational; so in this case it has been contended there are criteria from which to judge of Mr. Knight's treatment of his children in his lifetime, and after his death by his will. You are entitled, indeed are bound, to consider this case not in reference to any particular act, not to confine your attention to one particular act such as the making of the will, but you must consider Mr. Knight's life as a whole in order to determine whether in January, 1869, when he made the will, he was of sound mind. Gentlemen, I think I can give you some assistance in determining the question before you by referring to what has been said on the subject in another department of the law. Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in *McNaughten's Case.* (1) No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which will be of use to us in considering the points before us. Lord Chief Justice Tindal, in expressing the opinion of all the judges, said—"In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of committing or executing the act the party was labouring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

(1) 10 Cl. & F. 200.

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That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life,—was the man at the time the act was done of sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into. The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who, being confined in a lunatic asylum, is called upon to give evidence. First, the judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, —I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention. (1) Now I would call your attention to

(1) In summing up the case of *Burdett and Another* v. *Thompson* (July 3), to the jury, Sir J. Hannen said:

"The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposi-

a case which has been frequently adverted to during the course of this trial, the case of *Banks* v. *Goodfellow* (1), which was decided in the Court of Queen's Bench, when I had the honour of being a member of it. I was a party to the judgment, but the language of it was that of the present Lord Chief Justice. As a party to it, I am bound by it in the sense in which I understand its words. There can be little room for misconception as to its meaning, but I will explain to you the scope and bearing of it. It was a case in which a man who had been subject before and after making his will to delusions, was not shewn to be either under the influence of those delusions at the time, or, on the other hand, to be so free from them, that if he had been asked questions about them, he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for many years, and to whom he had always expressed an intention to leave his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, and of whom it was right he should take care on his death. It was left to the jury to say whether he made that

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tion of law which will guide you in determining it. Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will. I have been misunderstood by some persons who have commented on what I said on this subject in a recent case, and who appear not to have been sufficiently careful in examining the accurate meaning of the language used by me. It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. That is very different from the proposition that it requires a higher degree of soundness of mind to make a will than to do anything else. From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

(1) Law Rep. 5 Q. B. 549.

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will uninfluenced by the delusions he was shewn to have had before and after; and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered; and it was held that, under those circumstances, the jury finding the fact in that way, such finding could not be set aside. I will not trouble you by reading the whole judgment, which, however, would well repay the trouble of reading it, by laymen as well as by professional men, but I will pick out passages to shew you how carefully guarded against misapprehension the decision is. I shall have occasion by-and-by to call your attention to instances in which I think it has been sought to apply it incorrectly in the arguments which have been addressed to you. In one passage, the Lord Chief Justice says, "No doubt when the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should, in the first instance, be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong, where the will is, to use the term of the civilians, an inofficious one; that is to say, one in which natural affection and the claims of near relationship have been disregarded." In an earlier passage, the Lord Chief Justice lays down with, I think I may say, singular accuracy, what is essential to the constitution of testamentary capacity. "It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which,

(1) 2 Q. B. 570

if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand.' Gentlemen, I have no fear, when rightly understood, of that case being misapplied . . . . Now, gentlemen, these being the epochs of his life, let us direct our attention to the manifestations of character and condition of mind in him. I have already said, in my opening observations, that a very large allowance must be made for eccentricities. I do not say that they never in themselves can amount to evidence upon which a jury would be justified in coming to the conclusion that a man is of unsound mind, when coupled with what I will call, for convenience sake, an unnatural will, but, certainly, eccentricities must not be allowed to weigh heavily in the scale against the argument that a man is of sound mind. Really the forms and usages of society surround us like an atmosphere, and compress us all into a somewhat monotonous uniformity of mould, and if a man is relieved from this pressure, his individuality will expand into strange and sometimes fantastic shapes, but it must not be assumed he is on that account insane. Many of the acts of the deceased of this kind, which have been enumerated by counsel, cannot, I think, in themselves establish, and are very far from establishing, unsoundness of mind. They may suggest the idea, they may help to confirm the idea derived from other sources, that there was unsoundness in his mind, they may, so to speak, fill up the crevices of the argument, but they do not themselves constitute sound material on which a conclusion can be built as to the deceased's capacity. [His Lordship fully reviewed all the evidence which had been produced at the trial, and concluded:]

It is for you to say whether the accumulation of this evidence

(1) L. R. 5 Q.B. p. 565.

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(for the defendants) has not this effect on your minds that it leads you to the conclusion that, whatever fluctuation there may have been in the condition of Mr. Knight's mind, for some years before he made this will he had been subject to delusions, especially in reference to the character, the intention, and the motives of his son's acts; and if you so find, then I must impress upon you that it becomes the duty of the plaintiffs to satisfy you that at the time the testator made the will he was free from those delusions, or free from their influence. The burthen of proof, as it is called, is upon those who assert that the testator was of a sound and disposing mind. In considering the question, you cannot put aside the contents of, and surrounding circumstances connected with, the will. Again, on considering whether or not the testator was free from delusions as to the characters of his several sons, when he passed them over in the disposition of his real estate, leaving them only limited sums of money out of his personalty, you must not disregard the fact that he selected in their place one who had no natural claims upon him, of whom he knew little, and to whom he was under no such obligations as are usually recognized as the foundation of such gifts. You must take that into your consideration in determining whether at the time the deceased made his will those prevailing delusions to which I have referred had passed away, or were utterly inoperative. Gentlemen, I have detained you at some length. I felt the importance of the case was such as to justify it, and I now leave you to discharge that responsible duty of which I reminded you at the outset of the observations I have addressed to you.

The jury found, that on the 27th of January, 1869, the date of the will propounded by the plaintiffs, the deceased, John Knight, was not of sound mind, memory, and understanding.

April 22. *Dr. Swabey* (*C. A. Middleton* with him), applied to the Court to pronounce against the will, and to condemn the plaintiffs in the costs.

Parry, Serjt. (*Day, Q.C.*, and *Inderwick*, with him), asked that the costs of the plaintiffs should be paid out of the deceased's

estate. It was the duty of the executors to propound the will, they having no evidence before them to throw any reasonable doubt on the capacity of the deceased. The letters of the deceased, on which so much has turned, were unknown to the plaintiffs, all the papers having passed into the possession of the defendants on the death of their father. Moreover, the relatives of the deceased always treated him as sane. It seems to have been the almost invariable practice, under such circumstances, to give the executors their costs. They cited *Prinsep* v. *Dyce Sombre and Others* (1); *Coventry* v. *Williams* (2); *Jones* v. *Godrich.* (3)

Dr. Swabey. The application amounts to this, that the next of kin, who have succeeded, shall pay the costs of the executors, who have failed. It is not sufficient to shew that an executor has done his duty in order to obtain his costs out of the estate, not even if he be a disinterested party: *Rennie* v. *Massie.* (4) Where property is taken away from the next of kin, and possibly given to a stranger, they are favoured suitors in respect of costs; but the same principle does not apply to an executor who fails to establish his will: *Smith* v. *Tebbitt.* (5)

SIR J. HANNEN. The law has armed me with a large discretion, and one that I find much difficulty in exercising, on the subject of costs; but of course I must not shrink from it. On the best consideration that I can give to the subject, it appears to me that an executor is primâ facie justified in propounding a will. That does not carry us very far, because, of course, although he may be justified in propounding it in the absence of any evidence throwing light on the testamentary capacity of the testator; yet, if it is made to appear that, when propounding it, he must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he ought to be condemned in the costs. It would be very unjust to hold otherwise. The question in this case depends upon whether Sir Charles Boughton, as executor, was bound to propound this will, and to

(1) 10 Moo. P. C. p. 305.
(2) 3 Notes of Ca. p. 172.
(3) 5 Moo. P. C. p. 48.
(4) Law Rep. 1 P. & M. 118.
(5) Law Rep. 1 P. & M. 398.

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determine that I must consider the whole of the evidence which is now before me.

This was undoubtedly a very peculiar case. The testator had been in the uncontrolled management of his estate for a great number of years, and the correspondence with Mr. Clark shewed that he managed this property certainly with care, and apparently with prudence. Mr. Clark, the agent of the testator, was not called by the next of kin, but I think Sir Charles was as much entitled to rely on Mr. Clark as a witness in his favour as if he had been called. He had, indeed, given his assistance to the next of kin, but it would have been impossible for him, had he gone into the box, to have said otherwise than that he believed the testator to be competent to make a will, because after the execution of the will in question he would have permitted the testator to make a codicil in his favour.

I agree with Dr. Swabey, that it is in the highest degree improbable that something had not reached the ears of Sir Charles and of Mr. Marston concerning the eccentricities of the testator. But it appears to me that it would be highly dangerous to encourage the notion that because a person is eccentric in his habits of life he is therefore incompetent to make a will. There was nothing in the case which led me to suspect that Sir Charles had ever heard anything about the testator which went beyond eccentricity. His having bands of music at his house, the mode in which he exercised his horses, his shooting rooks in company with his servants, those and similar acts fell far short of evidence to establish incapacity. There were undoubtedly, after the execution of the will, facts as to conduct which must have come to the knowledge of Mr. Marston, and which ought to have excited doubts as to the testator's capacity at that time, but it was not until fully nine months after the date of the will. The all-important question was, what was the condition of the testator at the time of the making of the will? The circumstances that made an impression on my mind, and therefore probably on the jury, were these: when the testator's history came to be sifted, it turned out that he had recurring throughout his life a set of delusions which, from their nature, had a tendency to impair his disposing powers. He had suspicions of the motives which actu-

ated the persons about him. Of all these incidents Sir Charles must have been totally ignorant. Further, there is no reason to suppose that he was not totally ignorant of the testator's strange conduct at Boulogne immediately after the making of the will, and of the terms in which he wrote about Sir Charles himself. It is further to be remembered that the brother of the testator said that the testator was sometimes of sound mind, although he was insane at other times; and his son James stated that it was only when he became acquainted with all the inner life of his father that he came clearly to the conclusion that he was insane. Sir Charles had no knowledge of this strange inner life. In determining whether or not he should propound this will, he had only before him evidence that the testator was a very eccentric man. Practically he had nothing more; that is the utmost to which it went. Under these circumstances, was he justified in propounding the will? I think he was. I think the question of the testator's capacity was a very grave one, and he could not be expected to take on himself the responsibility of leaving it undetermined. The question is one which has exercised the minds of the most eminent men, and there still exists great divergence of opinion as to what amount of unsoundness will incapacitate a man for making a will. I think Sir Charles was justified in determining to take the opinion of the Court upon the state of the testator's mind. The decision of the question of costs must depend on the infinitely varying circumstances of each case; and the conclusion I have arrived at brings this case within the principle of the decisions to which I have referred on former occasions. Was the testator really and substantially the cause of the litigation that has occurred? I think the testator was substantially the cause of the litigation. His conduct was such that any person on whom was thrown the responsibility of determining whether or not his will was a good one was justified in bringing the whole of the facts bearing on that question before the Court. I am, therefore, of opinion that the costs should be paid out of the estate. The question must be decided on general principles, for the observation that a residue must bear the costs applies to every case. Thinking that Sir Charles was honestly led into this litigation by the fact that the testator seemed to all outward appearance to be capable

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of managing his affairs; and, in the absence of evidence to the contrary, was justified in bringing the case before the Court, I order costs on both sides out of the estate.

Will pronounced against. Costs on both sides out of estate.

Attorneys for plaintiffs: *Domville, Lawrence, & Graham.*
Attorneys for defendant: *Swinburne & Parker.*

April 22.

IN THE GOODS OF GENTRY.

Will—Revocation.

The testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character:—

Held, that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate.

JAMES GENTRY, of Washbrook, Suffolk, farmer, died on the 30th of October, 1872, leaving a widow, Elizabeth Gentry, and one child, Anne Sophia Birch, wife of John Birch, surviving him. On the occasion of his marriage with Elizabeth Gentry, his second wife, a settlement was executed by the parties, bearing date the 17th of October, 1855. Under this indenture the deceased transferred to Richard Bruce and Harry Canham his personal estate, consisting of household furniture, live and dead farming stock, crops, implements, utensils, and things in or about two farms then in his occupation, in trust to permit him to enjoy the same until he did some act whereby the premises became vested in another person or until his death, and on the occurrence of either event in trust to sell the same and to invest the proceeds in government or real securities, and to pay the interests to his wife for life or during widowhood for her own proper use and benefit. And on her death, in case she survived the deceased, on certain trusts for the benefit of his daughter and her children, and in case she died in his life-

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time, in trust for himself, his executors, administrators, and assigns. On the 8th of September, 1866, the deceased executed a will by which he gave to his son-in-law John Robert Birch and James Norfolk, their executors and administrators, all moneys, securities for moneys, debts, crops, live and dead stock and implements of husbandry, and all personal estate and effects whatsoever and wheresoever, in trust to carry on the farming business for a certain period, and then to convert such parts of the estate as was not so before into money, and out of the profits of the farming or of the proceeds of the estate to pay 19*l.* 19*s.* to James Norfolk, and to raise 2000*l.* and invest it in the names of the trustees, paying out of the interest or dividends arising thereon one pound a week to his wife for her life, and the remainder to his daughter for her separate use. On the death of the wife and daughter the 2000*l.* to be divided between the children of the latter. The deceased gave the residue of his personal estate to John Robert Birch absolutely, and appointed him and James Norfolk executors. On the 21st of February, 1871, the deceased executed a codicil by which he disposed of freehold land and cottages acquired subsequently to the date of his will, and confirmed the same, directing that the codicil should be taken as part thereof. On the 29th of September, 1872, he executed a second codicil to the following effect, "Memorandum of James Gentry, of Washbrook, farmer, made this 29th day of September, 1872. I desire to cancel the will that I made in the year 1866, and that the will that I made on the 17th of October, 1855, with the codicil dated February, 21st, 1871, should stand as my last will and testament. I also desire that my furniture should be divided between my wife and my daughter Sophia Birch, wife of John Robert Birch." It appeared from the affidavit of Mrs. Gentry that on the 20th of September, 1872, the deceased directed his wife to obtain from his solicitors, Messrs. Jackaman and Son, his will and codicil, which she did. That on taking them home she offered to read the will to her husband, but he said "No, take it away; don't let me see it any more," and at the same time he told her to destroy it. That she took the will into an adjoining room, cut it up, and destroyed it, but the deceased could not have seen her do so. When the memorandum was executed the settlement and codicil were shewn to the witnesses, and they were informed

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that the will referred to in the codicil had been burnt. No other will of the deceased could be found.

Dr. Deane, Q.C., and *Dr. Swabey* for Mrs. Gentry. The will of September, 1866, is absolutely revoked by the second codicil, but not the first codicil to it. The settlement is of a testamentary character and sufficiently referred to in the second codicil, and must be incorporated with it in the probate: *Sheldon* v. *Sheldon* (1); *In the Goods of Hubbard.* (2)

Dr. Spinks, Q.C., and *Inderwick* for Mr. and Mrs. Birch. The will of September, 1866, if revoked at all, was revoked only on the condition that the incorporation of the settlement with the second codicil could be carried out. It is a case therefore of dependent relative revocation. No certain date is given to the instrument intended to be cancelled by the first part of the second codicil, and the codicil of 1871, which the testator expresses a desire shall stand, confirms the will of September, 1866. If, however, the Court is of opinion that the will of September, 1866, is absolutely revoked, on behalf of the daughter they consent that the settlement shall be included in the probate.

SIR J. HANNEN. The first question for my consideration is what is the will to which the testator referred in the passages, "I desire to cancel the will that I made in the year 1866." It is said that the will is not identified by a date, otherwise than by a year, and therefore that the words may refer to some other will than that of September, 1866. I think that, in the absence of any evidence to suggest that another will existed, I may draw the inference that the will of the 6th of September, 1866, was the instrument which the testator had in his mind. The bare fact that there is nothing whatever to lead to a suggestion that there was any other will would leave me at liberty to draw such an inference, but there are facts to confirm me in that impression, namely, the circumstances referred to by Mrs. Gentry in her affidavit. They shew that the testator plainly had an intention to destroy this particular will. I therefore unhesitatingly come to the conclusion, in the absence of any evidence the other way, that he wished to express such an

(1) 1 Robert. 81. (2) Law Rep. 1 P. & M. 53.

intention in using the words, "I desire to cancel the will that I made in the year 1866." Again, it is said that it is a case of dependent relative revocation, and that the testator really meant "I desire to cancel this will in the event of my giving validity to the will (as he calls it) of the 17th of October, 1855, by such cancellation." It is said I must put a construction on the words themselves of the instrument. It is true that the words made use of by the testator must form the basis of my judgment, but in construing those words, I must also look at the facts to which those words have relation. Now I find that the testator, when speaking of this instrument, calls it a will, when, in fact, it was a settlement on his marriage. In determining therefore the effects of the words, "I desire to cancel the will which I made in the year 1866," and in considering whether they meant "in the event and in the event only of the will of 17th of October, 1855, being established," I must consider whether the testator could have had the meaning that he only intended to cancel the will of 1866 in the event of the instrument of October, 1855, which in truth was a settlement, being deemed to be a will. I confess that seems to me to be in the highest degree unnatural. The testator never could have intended that the cancellation should depend upon the question whether the document operated as a settlement or a will. I feel no doubt that he intended to cancel the will of 1866 absolutely. Such being my opinion, the next question is whether the settlement can be incorporated in the probate. I am relieved from the consideration of that question by the consents given on both sides that it shall be so. I think it is a matter to which the parties may consent. I will therefore order that probate shall issue of the documents dated the 21st of February, 1871, and 29th of September, 1872, together with the settlement dated the 17th of October, 1855.

Proctor for Mrs. Gentry: *Wadeson.*

Attorneys for Mr. and Mrs. Birch: *Aldridge & Thorn.*

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May 13.

REES *v.* REES AND REES.

Will—Sheet Interpolated—Presumption.

The will of the deceased had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last, a schedule of property, referred to in the will. On the death of the testator, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by the testator in substitution of the fourth. The several sheets were tied together with tape:—

Held, that the legal presumption that papers bound together and constituting the will, as found at testator's death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case.

JOHN HUGHES REES, of Llanelly, Caermarthenshire, barrister-at-law, died on the 11th of October, 1871, having made a will dated the 1st of March, 1871 (but in fact, executed the 1st of April, 1871), and a codicil, without any date. In the will he appointed Mansell Rees and Eleanor Rees, the defendants, executors, who propounded the same in the state in which it was found at the death of the testator.

The plaintiff pleaded that page four, as propounded by the defendants did not form part of the will at the time of execution; that the true fourth page was the fourth sheet as engrossed by the stationer, and that the codicil was not a testamentary paper. The will had been engrossed on fifteen sheets of paper by a law stationer, with blanks for the names of the legatees and the amount of the legacies. The blanks were filled up in the handwriting of the deceased. The fourth sheet had been removed and replaced by one in the handwriting of the deceased, but the original sheet had been preserved. The number of the sheet incorporated in the will had been altered from seventeen to four. On the sixteenth sheet a codicil had been written by the deceased, and on the eighteenth, a schedule of pictures, prints, and plate, which purported to be one referred to in the will. Mr. Mansell Rees deposed "that his father (the deceased) was confined to his room for six weeks before his death. That about three weeks before that event, his father called him to the bed, and told him to fetch the will from a davenport in the room, giving him the key to open it; that he did so.

He found the will on opening the davenport. It was doubled once, with red tape through the corner of the sheets. He took it to his father, and at his request tied up the tape and replaced it. The key he gave to his father; that was the only time he saw the will in his father's lifetime. After his father's death, the keys were taken from his neck, and the will was sealed up in an envelope in the presence of the plaintiff and others. On the day of the funeral, the sealed packet was opened and the will was read. Page 4, as it now stands, was then part of the will. The loose sheet, No. 4, was found in the davenport on the same occasion as the will. The will was found in the top part of the davenport. It had been folded but was lying flat." The attesting witnesses to the will only saw that the papers produced to them were a bundle, but they could not identify any particular sheet.

April 18. *Dr. Deane, Q.C.*, and *Dr. Swabey* appeared for the defendants. In the absence of direct proof, the presumption is that the will, as executed, was in the same state as when found on the death of the testator. [They referred to *Marsh* v. *Marsh.* (1)]

H. Lloyd, Q.C., and *Dr. Tristram*, for the plaintiff.

Cur. adv. vult.

May 13. SIR J. HANNEN. The defendants propound the will and codicil of John Hughes Rees, deceased. The main question in the cause was whether the fourth sheet of the will, as it was found at the testator's death, was the true fourth sheet of the will as executed, or whether another sheet found loose amongst the testator's papers after his death, and numbered four, was the true fourth sheet of the will. It was proved that the testator, a few weeks previous to his death, pointed out to his son, Mr. Mansell Rees, where his will was and told him to fetch it. Mr. Mansell Rees, by direction of the testator, put it back in the same place, where it was found after the testator's death. The will thus found had been engrossed by a law stationer, and from the draft the fourth sheet had been removed, and in its place a sheet entirely in the handwriting of the testator had been substituted. The will

(1) 1 Sw & Tr. 528; 30 L. J. (P. M. & A.) 77.

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originally consisted of fifteen sheets numbered consecutively by the stationer. Then followed three blank sheets, which appeared to have been numbered by the testator, 16, 17, and 18. On the sixteenth sheet the testator had written a codicil. The seventeenth had been removed and used by the testator in substitution for the fourth sheet of the stationer's draft; the number 17 at the foot, having been struck through with the pen, and the figure 4 substituted. The eighteenth sheet had been used by the testator to write on it a schedule of articles referred to in the will. Numerous blank spaces had been left in the stationer's draft to enable the testator himself to write in the names of legatees and certain dispositions, and these spaces were all filled up in the testator's handwriting. The several sheets of which the will consisted were all secured together with red tape at the corner in the usual manner. The attesting witnesses to the will did not examine the will so as to enable them to state of what sheets it consisted, but they stated that it seemed to them when they attested it to be similar in bulk and appearance to the will as found after the testator's death. In these circumstances the legal presumption is, that the sheets bound together and constituting the will, as found in the testator's desk, were so bound together at the time of the execution and attestation: *Gregory* v. *H. M.'s Proctor* (1); *Marsh* v. *Marsh.* (2) The question is whether this presumption is rebutted by any evidence in the case. The facts chiefly relied upon as tending to rebut the presumption that the testator had before execution substituted the sheet in his own handwriting for the fourth page of the stationer's draft, was that it was numbered 17 in the testator's figures, whereas the codicil proved to have been executed after the will was on a sheet numbered 16 in the testator's figures, thus leading to the inference as it was argued, that the removal of page 17 and its substitution for page 4 of the stationer's draft had taken place after or at the time of the execution of the codicil. I am of opinion, however, that neither this nor any other fact proved at the trial does rebut the presumption arising from the plight and condition of the will as found after the testator's death. If any theory consistent with the validity of the will can be

(1) 4 Notes of Ca. 620. (2) 1 Sw. & Tr. 528; 30 L. J. (P. M. & A.) 77.

suggested, which appears to the Court to be as probable as the theory on which the argument for its invalidity is based, the will as found must be maintained. Here, without relying on the fact that the testator was a barrister, and, therefore, presumably acquainted with the proper mode of executing wills, it is clear that he had been frequently, before the execution of this will, informed by his solicitor, Mr. Sawtell, of the requirements of the Wills Acts, and cautioned against making any alterations after execution. It is clear that the testator had had the draft will prepared with numerous blanks, which he intended to fill up, and did fill up himself before execution. It is clear, also, from the contents of the will, that he contemplated executing the schedule of articles to be annexed to the will. It is, therefore, highly probable that when he received the draft, and sat down pen in hand to make the necessary additions, he numbered the blank sheets at the end of the stationer's draft in contemplation of the possibility of using them for additions or the schedule. If, after making the additions, which appeared in page 4 of the stationer's draft, he determined to alter it and to substitute another sheet, it would be natural that he should untie the bundle of sheets that he might make use of one of the blank pages, and having done so, it would be a mere accident which of the pages already numbered he might take up. There could be no special reason why he should reject the first that came to his hand in favour of any other. I draw the inference that he by chance took the page that he had previously numbered 17, and having written his altered dispositions upon it he substituted it for the stationer's page 4, and endeavoured to obliterate the figure 17 and renumbered it 4. The fact that the schedule is written on page 18 does not appear to me to affect the question. It is a common occurrence for testators not to prepare lists or schedules referred to in their wills until after the execution of the will, and in this case it appeared that the testator had in a previous will referred to a schedule as accompanying it, but no such schedule was found. I have carefully considered the contents of the will, and the correspondence which passed between the testator and Mr. Sawtell on the subject of the will, but I am not able to discover in them any clue or guide to a conclusion. On the grounds stated, therefore, I hold that the presumption is

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not rebutted that the will as found was in the same condition, as to the sheets of which it consisted, as when executed, and pronounce in favour of the will in its existing state. A question was raised by the pleadings as to the codicil, but was abandoned at the trial. I therefore pronounce in favour of the codicil. As the testator, by leaving his testamentary papers in the condition in which they were found, has caused the litigation, the costs must be borne by the estate.

Attorneys for plaintiff: *Hudson, Matthews, & Co.*
Proctors for defendants: *Tebbs & Son.*

May 13.

DAVIES *v.* BRECKNELL.

Testamentary Suit—Verdict—New Trial refused—Material Witness Convicted of Perjury—Second Application for New Trial—Practice.

In a testamentary suit, the jury, being unable to agree, were discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused. Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in this Court in the above suit:—

Held, that that circumstance was not in itself sufficient to justify the Court in allowing a new trial after an application with that object had been rejected.

SIMON DAVIES propounded the will of Elizabeth Bailey, of Rotherham, Yorkshire, bearing date the 26th of October, 1869, in which he was appointed sole executor, and by which he obtained her whole property. The defendant William Brecknell, a grandson of the deceased, and universal legatee and devisee in a prior will, pleaded that on the day the will propounded bears date the deceased was not of sound mind, memory and understanding. Issue was joined on this plea, and in February, 1871, the question in dispute was tried before Lord Penzance and a common jury, who, being unable to agree, were discharged without giving a verdict. The case was again heard before Lord Penzance and a common jury on the 13th and 14th of March, 1872, when the jury returned a verdict in favour of the plaintiff and establishing the capacity of the deceased. On

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the 16th of April, 1872, a motion for a new trial was made before Lord Penzance on the ground that the verdict was against the weight of evidence, but he refused the application, pronounced for the will, and made no order as to costs. At these two trials the plaintiff was examined as a witness, and on cross-examination denied that in October, 1869, he had accompanied the testatrix to the office of Mr. Coward, a solicitor at Rotherham, for the purpose of having her will made, or that Mr. Coward had then refused to make her will in consequence of her imbecile state. On the 23rd of September, 1872, the plaintiff Simon Davies was indicted at the Central Criminal Court for perjury in regard to his evidence given in this Court, and on the testimony of Mr. Coward and two of his clerks, who had also been examined in this court on the same occasion, was found guilty and sentenced to twelve months imprisonment, which he is now undergoing.

On the 18th of March, 1873, Dr. Tristram obtained a rule nisi for a new trial in this Court by reason that a witness had since the first trial been found guilty of perjury on points material to the issue in the cause, and such rule came on for argument.

Dr. Tristram appeared for the defendant. He referred to *Petrie* v. *Milles* (1), *Price* v. *Duggan* (2), *Willis* v. *Barnett* (3), Chitty's Archbold's Practice, p. 1467.

Searle for the plaintiff.

SIR J. HANNEN. I am satisfied I cannot grant this application. It is indeed primâ facie a striking thing, that a man, who has been convicted of perjury, should remain in possession of a victory apparently obtained by the very evidence for which the jury has found him guilty of perjury. But in deciding this question I must bear in mind what had previously taken place. At the first trial a set of witnesses told their story, and on the other hand the plaintiff made his statement, and the jury, having heard and seen both sides, were unable to agree to a verdict. A second trial was had, the same witnesses were called and examined, and this man, who was afterwards convicted of perjury, told his story, and was believed

(1) 3 Doug. 27, at p. 28, n. (b). (2) 2 M. & G. 641, 643.
(3) Barnes' Notes, 443.

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by the jury. On application for a new trial Lord Penzance stated that he was not dissatisfied with the previous one, and refused the application. So that both the judge and jury who had seen the witness and heard him give his evidence held that he was entitled to credit. The other party, taking advantage of the machinery of the criminal law, indicted this man, who when he was heard in this Court had been believed, for perjury, and on that indictment, the mouth of the prisoner and of his wife being closed, those witnesses who were not believed in this Court had it all their own way, and he was convicted. As no new witnesses were called in the Criminal Court, and no new facts have been brought before me, I think I ought to accept the finding of the jury in this Court, sanctioned and approved as it was by Lord Penzance. The rule will be discharged with costs.

Attorneys for plaintiff: *Learoyd & Learoyd.*
Attorneys for defendant: *Duncan & Co.*

May 27.

DAVIES *v.* REYNOLDS, AND REYNOLDS INTERVENING.

Testamentary Suit—Costs out of Estate—Executor's Costs to have Priority—Insufficient Personalty.

The Court, in a testamentary suit, having made an order that the costs of all parties should be paid out of the estate, with a priority to the costs of the executor, who was universal legatee of the personal and devisee of the real estate, refused to vary such order, so as to make the costs a charge upon the real estate, in case the personalty were insufficient.

THIS was a suit instituted by the plaintiff, James Jump Davies, propounding the will of Thomas Hayes, deceased, as the executor therein named, which was opposed by the defendant Robert Reynolds and the intervener Thomas Reynolds. The questions at issue were tried at the Spring Assizes, 1873, at Liverpool, and the jury found a verdict for the plaintiff. On the 15th of May the Court pronounced for the will and ordered that the costs of the plaintiff and defendant and intervener should be paid out of the estate of the deceased, and that if the estate should not be sufficient to answer all such demands that the costs of the executor should be paid in preference and priority to the costs of the other parties. The personal

estate was of the value of 392*l.* 19*s.*, and the real estate produced 600*l.* per annum. The plaintiff under the will propounded was legatee of the whole personalty and devisee of the real estate.

Bayford applied to the Court to vary the above order by directing that the costs should be paid out of the real and personal estate of the deceased. In this case the Court directed the issues to be tried in the country, in which case, for all purposes in relation to or consequential upon the direction of the issues, the Court of Probate shall have the same jurisdiction, powers, and authority in all respects as belong to any superior Court of Common Law or to any judge thereof for the like purpose (20 & 21 Vict. c. 77, s. 36). But by 1 Vict. c. 110, s. 13, a judgment entered up against any person in her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, &c., of or to which such person shall at the time of entering up such judgment or at any time afterwards be seised, or possessed, or entitled, and shall be binding against such person and against all others claiming under him. The judgment, therefore, would be held to affect the real estate, if the words of the order were extensive enough; but where an order has been made for costs to be paid out of the estate, it has been held that the words designate a particular fund, namely, the personal estate: *Newton* v. *Newton* (1), so that it is necessary to introduce a more general term. In the cases *Pratt* v. *Bull* (2) and *Crispin* v. *Cumano* (3) the sections under consideration were the 25th (20 & 21 Vict. c. 77) and 18th (1 & 2 Vict. c. 110). The word "enforcing," which appears in 20 & 21 Vict. c. 77, s. 25, and upon which the decision in those cases turned, does not occur in 20 & 21 Vict. c. 77, s. 36, upon which the defendant relies.

[SIR J. HANNEN. In *Young* v. *Dendy* (4) it was held that this Court had no jurisdiction to order costs to be paid out of real estate. It cannot have been intended to enlarge the powers of the Court on the accident that a case is disposed of at the assizes and not here.]

Inderwick, for the plaintiff, contended that the Court of Probate

(1) 13 Ir. Ch. 245.

(2) 4 Giff. 117; 1 D. J. & S. 141; 32 L. J. (Ch.) 21, 144.

(3) Law Rep. 1 P. & M. 622.

(4) Law Rep. 1 P. & M. 344.

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has no power to make an order as to costs which could not have been made by the Prerogative Court (20 & 21 Vict. c. 77, s. 29). That Court had no jurisdiction except over personal estate. The 61st section, under which the heir-at-law and devisees are made parties to a testamentary suit, is silent on the question of costs. The Court will not make an order which it cannot afterwards enforce.

SIR J. HANNEN. The effect, if I grant Mr. Bayford's application, will be that I shall take upon myself to make such an order as shall cast upon the executor, who is also devisee of the real estate, the whole costs of the litigation in which he was successful. My intention was simply to make the usual order in such cases that the costs of the unsuccessful party should be paid out of the estate. It is true that when I further added that the executor should have a priority in the payment of costs I did so inadvertently, not recollecting that he was also devisee of the real estate, and that consequently there was no necessity to give him such priority. The application must be refused.

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*

Attorneys for defendant and intervener: *Vizard, Crowder, & Co.*

June 17.

IN THE GOODS OF EYNON.

Will—Execution—Attestation and Subscription.

The deceased executed his will in the presence of two witnesses, one of whom also made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and the witness opposite their respective marks and also the word witness, but he did not subscribe his own name:—*Held*, that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid.

JOHN EYNON, of Dowlais, Merthyr Tydvil, Glamorganshire, overman, died on the 7th of March, 1873. He left a will, dated the same day, in which he appointed Mr. Thomas Howells and Mr. John Evans executors. It concluded as follows:

"In witness whereof I hereunto set my hand, this seventh day of March, 1873.

× John Eynon.

×—Witnes Reese Reese."

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It appeared from the joint affidavit of Thomas Howells and Reese Reese that the deceased executed this paper by making his mark in their presence, and that they attested the same by the said Reese Reese affixing his mark, and the said Thomas Howells writing the words "John Eynon" against the mark of the deceased, and the word "witnes" and the name "Reese Reese" against the mark of the other witness, and that the will was read over to the deceased before he made his mark. Thomas Howells further deposed that in what he did he did not act merely as executor, but that he took a part in the execution with the full intention of witnessing the signature of the deceased and of Reese Reese. The object of the testator, and of him and his fellow-witness, was to have a valid will made to provide for the interests of the deceased's children, who were all infants. That the only reason why he did not write his own name when subscribing the will was that the testator was very ill, and died shortly afterwards, on the same day, and consequently the transaction was very hurried.

Dr. Tristram moved for probate of the will. Mr. Howells did four things: he wrote the name of the deceased, the word "witnes," and made a scratch before that word; and lastly, he wrote the words "Reese Reese." Either of these acts would be a sufficient subscription if he did it with an intention to attest. At any rate, when the witness wrote the word "witnes," he intended thereby to attest the execution of the will. [He referred to *Playne* v. *Scriven* (1); *In the Goods of Trevanion* (2); *Charlton* v. *Hindmarsh*. (3)]

SIR J. HANNEN. I have no doubt this is a genuine will, although as regards the matter of form it is not duly executed. I can only decide the question in consideration of the requirements laid down by the legislature. The deceased's signature must be made or acknowledged in the presence of two witnesses, who shall attest and shall subscribe the will in the presence of the testator. No particular form of attestation is necessary, but the act done by the witness must be intended by him to evidence his

(1) 1 Robert. 772. (2) 2 Robert. 311.
(3) 1 Sw. & Tr. 433; 28 L. J. (P. M. & A.) 132.

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attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation. In this case I cannot do so. Mr. Howells begins his affidavit by saying in general terms that he attested the execution of the will by writing the name "John Eynon" against the mark of the deceased, and the word "witnes" and the name of "Reese Reese" against the mark of Reese Reese. He then goes on to explain that he was not acting in his capacity of executor appointed in the will, but that he took a part in the execution with the full intention of witnessing the signatures of the said testator and of Reese Reese. No doubt that is true, that he took part in the execution with such intention, but unfortunately he did not carry out his full intention. He never made any mark with an idea of attesting the execution of the will, but he wrote the word "witnes" with the idea that he thereby identified the mark as the mark of his fellow-witness. The application must be refused.

Proctors: *Nelson & Son.*

June 24.

In the Goods of McCABE.

Will—Words written on Erasure—Words erased not apparent—Dependent relative Revocation—Parol Evidence.

The principle of dependent relative revocation applies to the case where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The Court will receive evidence to shew what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee.

Esther Jeremy McCabe, late of Ticehurst, Sussex, spinster, died on the 3rd of March, 1873, having made a will dated the 27th of August, 1863, in which she appointed Robert Jeremy McCabe sole executor. The will was found by deceased's sister, Mrs. Laming, after the death of Miss McCabe, in a davenport in Mrs. Laming's house, the property of the deceased. It was in an envelope which had been sealed, but the seal had been broken. The will was entirely in the handwriting of the deceased, and con-

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tained the following clauses: "After payment of all the above legacies, I will and bequeath to my sister Caroline Jeremy Luro half of the sum of money remaining undisposed of, and to my *sister Louisa* Galsworthy the remaining half of the same sum . . . To my *sister Louisa Jeremy Galsworthy* I leave, as a remembrance, the print hanging at present in my bed-room. And the whole of the remainder of my personal effects and property of whatsoever nature, excepting any sum of money which may remain after payment of all the above-mentioned legacies, I leave to my *nieces and nephews*." The words in italics were written on erasures, but the attesting witnesses could give no information or explanation whatever in reference to them. Messrs. Chabot and Netherclift were of opinion that the words written under *sister Louisa*, in the first paragraph, were *niece Edith*. Mr. Galsworthy, in his affidavit, stated that at the date of the will, the 27th of August, 1863, his wife Louisa Galsworthy was seriously ill, a fact well known to the testatrix, and it was not expected either by her husband, by the testatrix, or any other member of the family, that she would recover; and that he had no doubt that by reason thereof the testatrix believed that any bequest of a share of her property to her sister would be inoperative, and she determined to give such share to Louisa Galsworthy's only child Edith, to whom testatrix was much attached. At the end of the year 1864 Louisa Galsworthy completely recovered from her illness, and the fact of such recovery was known to the testatrix, who visited her sister in 1865. In consequence of the recovery of her sister, the testatrix probably erased, or attempted to erase, the words *niece Edith* from the will, in order to substitute in the place thereof the name of her sister, and in consequence of the space being insufficient for the full name, left out the word Jeremy, which in other cases she had always used. Louisa Galsworthy died in October, 1866, and from that time the testatrix was incompetent to manage her affairs, or make a new will.

June 10. *Dr. Tristram*, for the executor, applied for probate. As there is no evidence at what time the words inserted were introduced, the presumption is that they were so after execution, and they will be omitted; and as there is no satisfactory evidence what the words erased were, the probate will go in blank as to them.

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Dr. Deane, Q.C., Dr. Spinks, Q.C., and *Inderwick*, appeared for Miss Edith Galsworthy and other parties interested.

Cur. adv. vult.

June 24. SIR J. HANNEN. By the will of the testatrix, as found at her death, half the residue of her money was left to her sister Louisa Galsworthy; the words *sister Louisa* were written on an erasure, and as the attesting witnesses could give no explanation of the alteration, these words must be rejected. But it is alleged that the words erased were *niece Edith*. It is stated by Messrs. Chabot and Netherclift that they can, with the assistance of a magnifying-glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts, for the statute of wills gives no effect to obliterations, except so far as the original words shall not be apparent. And this has been decided to mean, "apparent on an inspection of the instrument," not "apparent by extrinsic evidence:" *Townley* v. *Watson*. (1) But as this is a case not merely of obliteration, but of substitution, I am at liberty to inquire whether the testatrix did not intend only to revoke the original bequest, on the supposition that she had effectually substituted another. This is established by the cases of *Brooke* v. *Kent* (2); *In the Goods of Harris* (3); *In the Goods of Parr*. (4) In the last-named case Sir C. Cresswell expressed a doubt whether the doctrine of dependent relative revocation could be applied to cases where not merely an appointment of a fresh executor was attempted, but a new legatee was substituted; but the judgment of Sir W. Grant, in the case *Ex parte Earl of Ilchester* (5), shews that the doctrine is equally applicable where the later invalid will or bequest is in favour of a different person to the one named in the earlier. The designation of a fresh legatee is, no doubt, an important circumstance to be considered in determining the question of fact, whether the destruction or obliteration was intended

(1) 3 Curt. 761.
(2) 3 Moo. P. C. 334.
(3) 1 Sw. & Tr. 536.
(4) 29 L. J. (P. M. & A.) 70; 6 Jur. (N.S.) 56.
(5) 7 Ves. 372.

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to be dependent on the efficacy of the substituted disposition; but where that is clear, the nature or extent of the contemplated alterations are immaterial. This is well illustrated by the circumstances of the present case. If the words written on the first erasure be rejected, the bequest in the will will run thus: "*to my* ——— *Galsworthy.*" This makes it clear that the bequest was to some connexion of the deceased of the name of Galsworthy. Her only relatives of that name were her sister, her sister's husband, and her sister's daughter. The facts stated in the affidavit of Mr. Galsworthy make it in the highest degree probable that the bequest was not originally made to the deceased's sister, because she was then dangerously ill and expected to die. In this state of things, it was natural that the bequest should be made to one of her family, as it is clear it was, but it cannot be supposed that the testatrix intended to revoke a bequest made under such circumstances absolutely, and without reference to her desire to substitute the name of her sister, who had been restored to health. I cannot have a doubt that she would not have obliterated the name of that member of her family of the name of Galsworthy, which originally stood in the will, if she had not believed that she could validly substitute the name of her sister; and if this be so, the doctrine of dependent relative revocation is applicable, and I am at liberty to have recourse to any means of legal proof to establish what the obliterated words were. In this inquiry I accept the evidence of the experts to this extent, namely, that that which is visible of the remains of the letters which are obliterated is consistent with the theory that the words were *niece Edith,* and inconsistent with the theory that they were *brother-in-law,* or any other words which can be reasonably suggested to fill up the blank between *my* and *Galsworthy;* and taking this in combination with the other evidence as a whole, I come to the conclusion that the words obliterated were "niece Edith," and I direct probate with those words restored. The other words written on erasures, not being accounted for, must be rejected.

Attorneys for executor: *Lofty & Potter.*
Attorney for Miss Galsworthy: *J. Galsworthy.*

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June 24.

DANCER *v.* CRABB AND THOMPSON.

Will—Revocation, Total, partial, or contingent—Dependent relative Revocation.

The testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Testatrix, feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will:—

Held, that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed.

MARY THOMPSON, late of Fulham Road, Middlesex, died on the 14th of September, 1872, having executed a will bearing date the 28th of June, 1865, in which she nominated Henry Prall and Edward Upward executors. On the death of Mrs. Thompson it was found that she had destroyed the greater portion of her will, but had preserved the last part in the following words: "In equal shares for their sole and separate use" (a line had been drawn through these words); "and as to all the residue of my estate and effects whatsoever and wheresoever, I give the same unto such of the said Eleanor Dancer, Mary Dancer, Jane Prall, Maria Dancer, Elizabeth Dancer, Amy Dancer, and *Alfred Upward* (these words in italics were struck out) as shall be living at my decease in equal shares as tenants in common, and as to females for their sole and separate use. As witness my hand this twenty-eighth day of June, 1865." The signature of the deceased, the attestation clause, and signatures of the witnesses remained untouched. By the original will the deceased appointed executors as above, gave a legacy of 100*l.* to George Robertson under certain circumstances, and bequeathed her jewelry, plate, trinkets, and ornaments unto and between the six daughters of her friend Alexander Dancer, concluding with a residuary clause as above stated. The plaintiff, Maria Dancer, in her declaration propounded the will of the 28th of June, 1865, and in the second paragraph alleged that subsequently to the execution

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of the said will the said testatrix revoked a portion thereof by tearing off and burning such portion with the intention of revoking such portion only, preserving nevertheless carefully the portion of her said will which contained her residuary bequests, together with her signature and the subscriptions of the attesting witnesses to the said will, and that by reason of the premises the said portion of her said will so preserved as aforesaid, and which is filed by plaintiff in the registry and referred to in her affidavit of scripts is entitled to probate. The defendants Elizabeth Isabella Crabb and Samuel Thompson pleaded that the will propounded was not duly executed in accordance with the statute 1 Vict. c. 26; that subsequent to the execution of the said alleged will the said deceased, by tearing, burning or otherwise destroying, revoked the whole of the said will, and not only part thereof, and that the portion of the said alleged will filed in the registry and referred to by the plaintiff's affidavit of scripts is not the last will and testament of the deceased, and is not entitled to probate as alleged. With their pleas the defendants gave notice that they only intended to cross-examine the witnesses produced by the plaintiff. An appearance was entered for Edward Upward, the executor named in the will propounded, but no declaration was filed by him; at the hearing, however, by consent, counsel was allowed to argue on his behalf as if he had propounded the entire will dated the 28th of June, 1865. The plaintiff, Miss Maria Dancer, gave evidence that she was acquainted with the deceased, Miss Thompson, and that in February, 1872, she called upon the deceased at her request. The deceased produced her will and read it over, and then said that she wished Mr. Upward's name to be struck out of it, as she wished to get rid of him. She asked the witness to write what she dictated, which witness did on a separate paper. On a second occasion in March the deceased again produced her will which was then written on the first side of a sheet of foolscap paper, tore off the blank sheet of the will, and gave it to witness, and having in her hand the will and paper written at the first interview dictated to witness, who wrote what was dictated on the blank sheet. When she had reached the residuary clause in the will the deceased tore off the upper half of the will and burnt it. She then struck through with a pen the first few words of the portion of the will

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which was left, and the name Alfred Upward therein, and rolling up this portion of the will with the paper on which the witness had written, put them away in her desk, saying she would leave them there with her signature as her will. In a few days afterwards witness again saw the deceased, who produced the papers from the desk, and the witness added some bequests at her dictation. It was proved that after her first interview with Miss Dancer, the deceased shewed to George Hazel, at whose house she lived, her will, which she called her old will, and said that perhaps she would make a new one. She subsequently pointed to some papers, and said she could not let him read her new will as it was sacred. The papers tied together with red tape were found at her death in a box where she kept her private papers.

May 23. *W. Williams, Q.C.*, and *Dr. Tristram*, for the plaintiff, contended that the act done amounted to a partial revocation of the will only, and asked for a grant of administration with the fragment of the will to be made to the plaintiff. The intention to revoke the bequest to Mr. Upward was absolute and not dependent upon the execution of another will, but that as regards the rest of her will the deceased had come to no final intention to revoke it. [They referred to *Clarke* v. *Scripps* (1); *Powell* v. *Powell.* (2)]

Inderwick, for Mr. Upward, contended that the whole will must be admitted to probate. Cancellation is inoperative to revoke a will or bequest (Williams' Executors, 5 ed. pp. 147, 154), consequently the gift to Mr. Upward of the residue is not revoked. The intention of the deceased to revoke any portion of her will was not absolute, but dependent upon her leaving another valid testamentary paper. [He referred to *Dickinson* v. *Swatman* (3); *Clarkson* v. *Clarkson* (4); *Eckersley* v. *Platt and Others.* (5)]

Dr. Spinks, Q.C., and *Dr. Swabey*, for the defendants, contended that the whole will was revoked, and that the deceased must be held to have died intestate. The very foundation of the intended alteration was a desire to get rid of Mr. Upward, which could only be

(1) 2 Robert. 563.
(2) Law Rep. 1 P. & M. 209.
(3) 30 L. J. (P. M. & A.) 84.
(4) 2 Sw. & Tr. 497; 31 L. J. (P. M. & A.) 143.
(5) 36 L. J. (P. & M.) 7.

effected by a revocation of the whole will. The appointment of executors is an essential part of the will, and when the deceased tore the will in such a way as to destroy the part in which they were appointed she shewed an intention that the paper should not operate as a will. It cannot be a case of dependent relative revocation, for there was no definite act on which the revocation could depend. It is not enough to say that the deceased did not intend to die intestate; and having already executed a will, she could not have believed that the fragment of her will and the instructions together constituted a new and valid will. [They referred to *Christmas* v. *Whinyates*. (1)]

Cur. adv. vult.

June 24. SIR JAMES HANNEN. In this case the plaintiff Maria Dancer propounds the will of Maria Thompson deceased, dated the 28th of June, 1865, and alleges that after the execution of the said will the testatrix revoked a portion by tearing off and burning it with the intention of revoking such portion, preserving the remainder, which contained her residuary bequests together with her signature, and the subscription of the attesting witnesses, and claims probate of the portion so preserved. The defendants traverse the due execution of the will, and plead that the deceased revoked the whole of the said will, and not a part only, and deny that the portion preserved is entitled to probate. The deceased on the 28th of June, 1865, duly executed a will which had been prepared for her by her solicitor, Mr. Dawes. By this will, after giving directions as to her funeral, she appointed her friends Henry Prall and Alfred Upward, executors. She left a legacy of 100*l.* to George Robertson, the then manager of her ironworks, if he should be employed by her at the said works at the time of her decease, but not otherwise; she then gave her jewelry, plate, trinkets, and ornaments of the person, unto and between the six daughters of her friend Alexander Dancer, in equal shares, for their sole and separate use, and as to the residue of her estate and effects, whatsoever and wheresoever, she gave the same unto such of the said six daughters of Alexander Dancer and Alfred Upward as should be living at her decease, in equal shares as tenants in

(1) 3 Sw. & Tr. 81.

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common. In the early part of 1872 the deceased sent for the plaintiff, one of the daughters of Alexander Dancer, and having produced her will and read it, informed her that she wished Mr. Upward's name struck out, and requested plaintiff to write something for her. She thereupon dictated some minutes of alteration which she desired to make in her will. These minutes are rough and incomplete, and were described by the plaintiff as "only a trial and kind of scribble;" but as far as they are intelligible they were afterwards embodied in the draft to be next mentioned. They do not contain any mention of executors, or of Mr. Upward. In March, 1872, the deceased again sent for the plaintiff and produced the will together with the rough minute which had been drawn up on the former occasion, and having torn off the blank sheet of the will requested the plaintiff to write upon it to her dictation. Then, holding the will in her hand and having the rough minute which the plaintiff had written on the former occasion before her, she dictated what appears to have been intended as a formal will, beginning, "This is the last will and testament of me, Mary Thompson," &c. It repeats the direction as to her funeral contained in her will of the 28th of June, 1865, and appoints her friend Henry Prall sole executor and trustee. She then gives certain money, invested in Bombay and Baroda shares, to be equally divided between the six daughters of Alexander Dancer for their sole and separate use; bequeaths the rents due to her from the unexpired lease of certain houses to her godson F. T. Prall, son of the said Henry Prall, and directs her plate to be sold and the money to be equally divided between the said six daughters of Alexander Dancer. The legacy to George Robertson was omitted because he had ceased to be in her employment. The plaintiff having written thus far, the deceased desired her to leave off as she felt very ill. The plaintiff in her evidence says, that the deceased then "tore off the part I had copied from and burned it." That is, she tore off all but the residuary clause and the words which preceded that clause in the same line, with its beginning, "in equal shares for their sole and separate use." The witness, in continuation of her narrative, stated that "the deceased then put the remaining portion away with what I had written, having first struck out Mr. Upward's name and the few words at the top." She

put them away in a case in a desk and locked them up. She said she would roll them both up and leave them there with her signature as her will. Not long after this interview she sent for the plaintiff a third time, and asked her to write some more to her dictation. This the plaintiff did, substituting for the legacy to the deceased's godson an expression of a wish that the bequest to his mother, Jane Prall, one of the six daughters of Alexander Dancer, should be left at her death to the godson. The bequest of the rents was struck out by the plaintiff by direction of the deceased. This alteration was made because the lease of the house had fallen in. Then followed bequests of all her jewelry to her friend Mrs. Gordon, her personal apparel to Alice Hazel, and her piano to the plaintiff. The testatrix then said she felt too ill to continue. She said she would send for Mr. Dawes to see that what she had done was correct or right. This interview was in March, 1872. The deceased did not send for Mr. Dawes until the 30th of August, about a fortnight before her death. She then spoke of the lease of the houses, and her plate at her banker's, but did not mention her will. Mr. Dawes asked her if she had any other business to transact; she answered she had not.

The conclusions of fact which I draw from this evidence are—1. That the deceased did not intend by tearing and burning a portion of her will to cancel it in toto; 2. That she believed that by preserving the residuary clause, with her signature and the subscription of the witnesses, and placing this portion with the paper written at her dictation, she was constituting a new will; 3. That but for this belief she would not have torn off the portion which she destroyed, seeing that the substituted disposition did not substantially alter her distribution of the bulk of the property amongst the Dancer family, and that she could not have thought that the tearing was necessary in order to get rid of Upward as executor, because from the manner in which she dealt with the more important residuary clause she shewed that she considered striking his name out sufficient; 4. That she did not preserve the portion of the will and this paper written by the plaintiff as instructions for a new will, her statement to the plaintiff together with her conduct with Mr. Dawes shewing that she considered she had already made a new and valid will. Upon these findings, the question arises

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whether the destruction of the first portion of the will was an absolute cancellation, or only a dependent relative cancellation of the part torn off and burnt. The leading cases on the subject are collected in Williams on Executors, 4th ed. part 1, book 2, ch. 3, s. 1, p. 142, and the doctrine of dependent relative revocation is there fully explained and illustrated. The result is thus stated: "Where the act of cancelling is done with reference to another act meant to be an effectual disposition, it will be a revocation or not according as the relative act is efficacious or not." In the well-known cases of *Onions* v. *Tyrer* (1) and *Hyde* v. *Hyde* (2), the alterations in the substituted instrument were of slight importance; but the effect of the intended alterations makes no difference in the application of the doctrine if the testator destroys the first will only because he supposes he has completed another. This is laid down by the Master of the Rolls, Sir W. Grant, in *Ex parte Earl of Ilchester.* (3) "The rule of the civil law is, Tunc prius testamentum rumpitur cum posterius perfectum est. In *Limbery v. Mason* (4) that is laid down as the rule of our law. There is no doubt but the testator by any writing, &c., or by any cancelling designed merely to disannul the former will, might have revoked it without more; but he designed to do it by a new will, and unless such writing be effectual to operate as a will it shall not amount to a revocation." The decisions cited from *Clarke* v. *Scripps* (5) down to *Eckersley* v. *Platt & Others* (6) do not affect the application to the present case of the earlier authorities I have referred to. They enforce under varying circumstances the principle that although the testator does an act which unexplained would be one of revocation, yet if it appear that he did it only as a part of the means of setting up another will, if that end be not accomplished the former will is not revoked. Or, to state the proposition in different language, if the testator's act can be interpreted thus: "Whatever else I may do, I intend to cancel this as my will from this time forth," the will is revoked; but if his meaning is, "As I have made a fresh will my old one may now be destroyed," the old will is not revoked

(1) 2 Vern. 742; 1 P. Wms. 343.
(2) 1 Eq. C. Ab. 409.
(3) 7 Ves. at p. 380.
(4) Comyns., 451, cited; 4 Burr. 2515.
(5) 2 Robert. 563.
(6) Law Rep. 1 P. & M. 281.

if the new one be not in fact made. I think that the latter form of words correctly expresses the state of the testatrix's mind at the time when she tore her will of June, 1865. I may add that I have no doubt that the testatrix attached special importance to the striking out of Mr. Upward's name from her will, but it cannot be supposed that she intended to annul the appointment of Upward and Prall as executors, except on the assumption that she had effectually appointed Prall by himself, and I have already pointed out the more important alteration of depriving Upward of the benefit of the residuary clause was attempted to be made by striking the pen through his name in a portion of the will which beyond all doubt was intended to remain subsisting. I am of opinion, therefore, that the original will was not revoked, and that probate must be decreed of the portion which remains, together with the draft of the part destroyed. Mr. Upward's name must of course be restored, as it was struck out after execution. The costs of all parties to be paid out of the estate.

Attorneys for plaintiff: *Dawes & Son.*
Attorney for defendant: *John Coombs.*

KEEN *v.* KEEN AND ANOTHER.

April 23.

Will lost or destroyed — Question of Revocation — Evidence — Admissibility of Declarations of Testator.

In order to rebut the presumption of revocation arising from a will which was in a testator's possession not being found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The Court held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed; and therefore that a declaration by the testator that he had burnt his will was admissible, not as evidence of the fact of destruction, but as evidence of intention.

THE plaintiff propounded the draft of a will, dated the 21st of October, 1854, of William Keen, of 183, Essex Road, Islington, leather seller, who died on the 20th of March, 1872. The will appointed the plaintiff, who was his widow, universal legatee.

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The defendants, a brother and sister of the deceased, pleaded: 1. Not duly executed. 2. That the contents were not as alleged. 3. Revocation by destruction. The cause was heard before Sir J. Hannen, without a jury, and the only question raised was that of revocation. The will could not be found after the testator's death, and evidence was produced on the part of the plaintiff for the purpose of rebutting the presumption of revocation arising from its disappearance. This evidence was to the effect that the testator had remained on good terms with the plaintiff up to the time of his death, that he had always expressed a wish that she should take all his property after his death, and that a few months before his death he had spoken of the will as being then in existence. Evidence was produced on the part of the defendants for the purpose of shewing that during the latter part of his life he was on bad terms with the plaintiff, and made repeated complaints respecting her conduct to him. There was also evidence of declarations by the testator that he did not intend to leave his property to her, and that he had destroyed his will by burning it.

Dr. Swabey, for the plaintiff, objected to the admission of the declarations as to the destruction of the will, on the authority of *Shallcross* v. *Palmer* (1), and *Staines* v. *Stewart and Jones.* (2)

Searle (*Jacques* with him), for the defendants, relied on *Whiteley* v. *King.* (3) But, independently of the authorities cited, the declarations of the testator are admissible in this case, not as evidence of the fact but as evidence of intention, to contradict the evidence of intention produced by the plaintiff. If the plaintiff is at liberty to produce evidence of the deceased's intention to adhere to the will, it must be competent to the defendant to produce evidence of his intention not to adhere to it, and a declaration that he has burnt it is clearly evidence of such intention.

The cases of *Johnson* v. *Lyford* (4), *Brown* v. *Brown* (5), *Sutton* v. *Sadler* (6), were also referred to.

SIR J. HANNEN. I entertain no doubt that there was a will

(1) 16 Q. B. 747.
(2) 2 Sw. & Tr. 320; 31 L. J. (P. M. & A.) 10.
(3) 17 C. B. (N.S.) 756; 27 L. J. (Q. B.) 173.
(4) Law Rep. 1 P. & M. 546.
(5) 8 E. & B. 876.
(6) 3 C. B. (N.S.) 87; 26 L. J. (C. P.) 284.

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duly executed by the deceased and that the copy propounded by the plaintiff is a correct copy of that will. But the question is whether I ought to draw the inference from the evidence that the will so executed was destroyed by the testator with the intention of revoking it. In order to determine that question I must consider in the first place whether there is sufficient evidence that it came into and remained in the testator's possession. Having reviewed the evidence bearing on this question his Lordship said he had come to the conclusion that the will was in the testator's possession.

The further question, he continued, then arises whether the will not being found after his death the court is to draw the inference that he destroyed it with the intention of revoking it. This case is clear from any suspicion of improper dealings with the will by the persons about the house at the time of his death. The widow was there, and the will was in her favour. Not having been destroyed after his death, was it destroyed by him during his life? If there were no evidence at all on that question the presumption of revocation would prevail. That presumption is sought to be rebutted by evidence of the testator's intention to adhere to the will after its execution, and the evidence of one witness which is unimpeachable no doubt tends to shew that at a date which he fixes as March, 1871, the testator did express an intention to carry out the disposition of his property which he had made by his will. But the evidence produced by the defendants, if it can be trusted, shews that his intention fluctuated. A question was raised as to the admissibility of some of that evidence. Now I think there can be no doubt that while on the one hand evidence of statements made by a testator subsequent to the execution of a will that he intends to act in conformity with the disposition contained in the will is clearly admissible, it necessarily follows that other statements made by the testator, to a contrary effect must also be admissible. The admissibility of such evidence cannot depend on the form of words in which the intention is expressed. The object of language is to convey ideas, and in the conveyance of ideas it matters not what particular form of words is used. Therefore a statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is

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evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion. The evidence of the defendants' witnesses in this case, leads me to the conclusion that the testator, whether justly or unjustly, did attribute to his wife some grave faults and complained of her conduct as making him uncomfortable. If a feeling of that kind arose between the husband and wife it might very well induce him to alter his testamentary intentions.

Having reviewed the evidence as to intention on both sides, his Lordship said that the conclusion he came to was, that the will, being in possession of the testator, was destroyed by him, very likely with the intention of making another, but that intention, if he entertained it, was never carried out. The Court therefore pronounced against the will. The costs of both parties would be allowed out of the estate.

Solicitors for plaintiffs: *H. R. Silvester.*
Solicitor for defendants: *James Wright.*

July 1.

WOODFALL AND OTHERS *v.* ARBUTHNOT AND OTHERS.

Administration—Will annexed—Trustees appointed in Substitution of Trustees in Will—13 & 14 *Vict. c.* 60.

The deceased executed a will in which he appointed executors and certain persons residuary legatees in trust. In 1873 the Master of the Rolls made an order whereby he substituted certain other persons as trustees in the place of the surviving residuary legatee in trust named in the will, and vested in the new trustees the estate of the deceased:—

Held, that on the citation and non-appearance or renunciation of the surviving executors, administration might be granted to the new trustees, although there had been no actual conveyance or assignment to them of the trust estate.

CHARLES WOODFALL, of Coonoor, Neilgherries, Madras, in the East Indies, and of Rocky Hill Terrace, Maidstone, Kent, a colonel on the retired list of Her Majesty's Indian army, died on the 7th of February, 1867, having made a will contained in two papers, dated respectively the 4th of September, 1858, and the 24th of November, 1858, and a codicil dated the 11th of August, 1864, in which will he appointed his brothers, Henry Dick Woodfall, and John Ward

Woodfall, his wife Anne Woodfall, and the person or persons who should compose the firm of Messrs. Arbuthnot & Co., of Madras, merchants and agents, at the time of his death, executors, and his wife and John Vans Agnew residuary legatees in trust. Anne Woodfall alone proved the will, and died on the 22nd of October, 1871, leaving part of her husband's estate unadministered. John Ward Woodfall pre-deceased his brother, the deceased Charles Woodfall, and Henry Dick Woodfall died on the 13th of April, 1869. The members of the firm of Messrs Arbuthnot & Co. at the time of the death of the deceased were William Pierson Arbuthnot, Patrick McFadyen, John Young, Alexander Mackenzie, and William Arbuthnot. On the 25th of January, 1873, in a cause headed In the matter of the Trustees Act, 1850, and of the trusts of two wills and a codicil of Charles Woodfall, deceased, the Master of the Rolls made an order by which he appointed the plaintiffs, Jane Woodfall, the Reverend Richard James Francis Thomas, clerk, and the Reverend Frederick James Nellen, clerk, trustees of the said will and codicil in substitution for John Vans Agnew, and vested in them the right to sue for and recover any chose in action, subject to the trusts of the said will or any interest in respect thereof. The plaintiffs took out a citation calling upon the surviving executors to accept or refuse probate of the will of the deceased, or shew cause why administration with the will annexed of the unadministered estate of the deceased should not be granted to them as substituted residuary legatees in trust. Messrs. Young, Mackenzie, and William Arbuthnot renounced; no appearance was entered to the citation by the other executors.

June 17. *Bayford* moved accordingly. He referred to *Cresswell* v. *Cresswell.* (1)

[SIR J. HANNEN. In that case it was required that before the grant issued the trust premises should be conveyed or assigned to the new by the original trustees. That has not been done in this case.]

The effect of the order made under 13 & 14 Vict. c. 60, s. 32, was to vest the estate at once from its date in the new trustees without any further formality.

Cur. adv. vult.

(1) 2 Add. 342.

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WOODFALL v. ARBUTHNOT.

July 1. SIR J. HANNEN. In this case an order was made by the Master of the Rolls appointing certain trustees in lieu of the surviving trustee appointed under the will of Colonel Woodfall, and the question was, whether administration with the will annexed should be granted to the substituted trustees. No conveyance had been executed by the old trustees to the new ones, and I had to consider whether, under the statute referred to (13 & 14 Vict. c. 60) the rights of the old trustees did not vest in the substituted trustees by the order itself without anything more being done. That depends in some measure upon the practice in the courts of equity. I have made inquiries, and I find that it is not necessary that there should be anything more done than has been. The effect of the vesting order is, under the operation of the statute, to transfer to the new trustees all the rights and powers of the old ones. Under these circumstances I think the grant may be made as prayed.

Proctor: *W. G. Jennings.*

July 8.

IN THE GOODS OF ROBARTS.

Will and Two Codicils in England—Other Codicils in India—Probate of First only—Power reserved to prove the other Codicils or authentic Copies thereof, when they arrive in this Country—Practice.

Under special circumstances the Court will grant probate of certain papers forming part of the will of a deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers or authentic copies thereof when they arrive, and on an undertaking on his part that he will do so.

CHARLES JAMES ROBARTS, a colonel in Her Majesty's Indian army, died on the 6th of January, 1873, at Deyrah, in British India, having made and duly executed a will, dated the 30th of September, 1844, in which he appointed Thomas Dent (since deceased) and William Dent executors and trustees. He subsequently executed six codicils, five of which were dated respectively the 2nd of May, 1857, the 19th of September, 1857, the 13th of October, 1859, the 17th of December, 1872, and the 2nd of January, 1873, and one was without date. By the codicil dated the 17th of December, 1872, he appointed Charles Need, a colonel in Her Majesty's Bengal In-

fantry, and Abdool Gyas Khan, a native of Cabool, trustees and executors of his will and codicils so far as relates to all his property, both real and personal, which at that time, or at the time of his death, was situated in British India. He also gave them power, in conjunction with, or by the directions of, the executors named in his will, to dispose of or retain and work his indigo estates situated in Bengal. By the first codicil of the 2nd of May, 1857, he had appointed James Joseph Mackenzie, a member of the firm of Messrs. Mackillop, Stewart, & Co., or in his absence from India any one of the members for the time being of the said firm who shall be in India, to be the executor in India of his will and that codicil. The original will and the first two codicils were in this country in the possession of William Dent; the other four codicils were in India, and no authenticated copies of them had been forwarded to this country. Application has been made to the High Court of Judicature at Fort William, Bengal, for probate of the will and six codicils to be granted to the executors in India, but the necessary formalities had not been completed at the time of the last communications from thence. An offer to purchase the indigo estate of the deceased had been made, and the executors were anxious to accept the same; but in order to complete the purchase and make a conveyance of the factory it was necessary that William Dent, the executor in this country, should execute and send to India a power of attorney authorizing the deed of conveyance to be executed and the purchase-money to be received, which he could not do until he is recognised as such executor. Each day's delay in the completion of the purchase would cause a considerable loss to the estate, by way of interest on the purchase-money—20,000*l.*

Inderwick moved the Court to grant probate of the will and two first codicils to William Dent, the surviving executor named therein, reserving power to him to prove the other four codicils when the originals or exemplified copies thereof, granted by a court of competent jurisdiction, should reach this country. He referred to *Fowlis* v. *Davidson* (1): see also *In the Goods of Metcalfe* (2); *Howell* v. *Metcalfe and Sanders.* (3)

(1) 4 No. of Ca. 149. (2) 1 Add. 343. (3) 2 Add. 348.

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SIR J. HANNEN. In *Fowlis* v. *Davidson* (1) the parties were all before the Court and consenting. The codicil omitted from the probate in the first instance was then in dispute and the cause of litigation in the court. In this case, if I grant probate of the will and two codicils, and subsequently the other codicils are brought over to this country, what then? If I make the grant as prayed I shall have no assurance that the other codicils will come before the Court for proof. However, the registrars have found a precedent (*Thomas Dalten, deceased* (2)), in which probate was granted of a will, and power reserved to prove a codicil thereto when it arrived in England. The will was proved in May, the codicil in the following July. As there is nothing to raise a doubt in my mind as to the good faith of the applicant, I see no reason why I should not follow that precedent. I therefore grant probate of the will and two codicils; but the executor must give an undertaking that he will prove the other codicils when they, or authenticated copies of them, are sent over to this country.

The order made was in the following form: "The Court granted probate of the last will and testament of the said deceased, and of two codicils thereto, the said will bearing date 30th September, 1844, and the said codicils respectively 2nd May, 1857, and 19th September, 1857, to William Dent, the surviving executor named in the said will; and further directed that in such probate a power should be reserved to the said executor to prove four other codicils, three of them dated respectively 13th October, 1859, 17th December, 1872, and 2nd January, 1873, and one without date (the said codicils being now in India), when and as soon as such codicils, or an exemplification thereof, or duly authenticated copies, shall arrive in this country. And the judge further directed that an undertaking on the part of the said William Dent should be filed in the registry of this court to prove such codicils as soon as they, or an exemplification thereof, or copies as aforesaid, should come to his hands."

Attorneys: *Lattey & Hart.*

(1) 4 No. of Ca. 149.

(2) Not reported.

IN THE GOODS OF GILL. 1873

Testamentary Suit—Executor—Renunciation—Retractation—20 & 21 Vict. c. 77, s. 79. *July* 15.

It has never been decided that an executor who has filed a renunciation of his rights may not afterwards retract such renunciation, notwithstanding the terms of s. 79 of the Probate Act, 1857, but he certainly will not be permitted to do so, unless he can shew that such retractation will be for the benefit of the estate or of those interested under the deceased's will.

ELIZA ELIZABETH GILL, of Old Spa House, South Norwood, Surrey, wife of William Gill, died on the 18th of March, 1873. By a will dated the 11th of April, 1872, made in respect of her separate estate or property over which she had a general power of appointment, she gave certain legacies, including one of 5000*l.* in trust for her sister Emma Mary Seager and her children, and the residue of her real and personal estate to her husband, whom she appointed sole executor. By a later will, bearing date the 7th of March, 1873, she bequeathed certain pecuniary and specific legacies, gave two sums of 1000*l.* in trust for a nephew and niece, 10,000*l.* for her sister Mrs. Seager and her children, and directed the trustees to stand possessed of the residue of her real and personal estate upon trust, to pay the income thereof to her husband for life, and after his death, to stand possessed of as well the capital as the income upon trust to pay certain legacies and, subject thereto, in trust for Barbara Constance Gill and Georgina Susan Gill, the daughters of William Gill, and for Alice Philpott and Ethel Philpott, daughters of Henry Philpott, of Brighton, in equal shares. By this will she appointed Henry Philpott sole executor, and Henry Philpott and J. R. Upton trustees. On the 22nd of March, 1873, a caveat was entered in the goods of the deceased by William Gill, and on the 23rd of April, 1873, Mr. Philpott filed a formal renunciation of all his rights and powers under the will of the 7th of March, 1873. On the 23rd of May, 1873, a citation was taken out by Mr. Gill, calling upon all the parties interested to propound or prove the will of the 7th of March, 1873, or to shew cause why probate of the will of the 11th of April, 1872, should not be granted to him as sole executor named therein. This citation was served upon

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Mr. Philpott, but the time for his appearance to be entered had not expired.

Dr. Deane, Q.C., moved the Court to allow Mr. Philpott to retract his renunciation, in order that he may propound the will of March, 1873, as executor. It appeared from the affidavit of Mr. Philpott, that when the caveat was first entered he consulted with his solicitors, who advised him that the proceedings to establish the will would involve him in great trouble and frequent journeys to London from Brighton, and so cause him to neglect his practice as a surgeon, and to suffer a loss in his professional income. He had since discovered that such advice was erroneous. According to the practice of the Ecclesiastical Courts, a renunciation was not a final act, and whenever a new representation was required to the estate of a deceased, it was necessary to cite all the parties having a prior claim to the applicant, even although such parties had on previous occasions renounced their rights. The 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, were passed to put an end to that inconvenience and not to prevent a retractation on sufficient grounds of a renunciation once filed. In this case no steps have been taken to prove the will, and no harm can be done if Mr. Philpott be allowed to retract his renunciation. [He referred to *In the Goods of Noddings* (1); *In the Goods of Badenach* (2); *In the Goods of Whitham.* (3)

[SIR J. HANNEN. On what ground do you put it that Mr. Philpott should be allowed to retract his renunciation?]

On the ground stated in the affidavit, that Mr. Philpott was under a misapprehension when he filed his renunciation.

[SIR J. HANNEN. Can any argument in your favour be based on the necessity for protection to the parties interested under the will?]

Mr. Philpott's children, who are minors, are largely interested in the residue as given in the will of March, 1873.

Inderwick, for Mr. Gill, submitted that the intention of the legislature, as contained in 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, was, where an executor once renounced, and his re-

(1) 2 Sw. & Tr. 15. (2) 3 Sw. & Tr. 465; 33 L. J. (P. M. & A.) 179.
(3) Law Rep. 1 P. & M. 303.

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nunciation was filed, or was cited, and did not appear, that at the moment of filing the renunciation or on the expiration of the time for appearance, his rights to the executorship should wholly cease. The filing of the renunciation is a final act. Mr. Philpott is not cited to take or refuse probate, but to propound the will, if so advised.

SIR J. HANNEN. Unless, on fuller consideration, I should feel that the words of the statute are imperative, I should not hastily decide that this Court is powerless to permit an executor who has renounced, on good grounds, to retract his renunciation. I do not decide the point on the present occasion. For even admitting I have the power, I should not exercise it in the circumstances of this case. The only reason given here is that Mr. Philpott has changed his mind; it does not appear that it will be for his own profit or for that of any one else that he shall be allowed to retract. He has only given up his rights as executor; he may still propound the will in another character, either as legatee or as guardian to his minor children who are residuary legatees.

Attorneys: *Upton, Johnson, Upton, & Budd.*

HOLDITCH AND CLIFTON *v.* CARTER AND OTHERS.

July 29.

Testamentary Suit compromised—Defendants' Costs included—Taxation.

In a testamentary suit a compromise was effected, which included a fixed sum to be paid to the defendants' attorney for his agreed costs. This sum was paid to him:—

Held, that the Court could not afterwards order his bill to be taxed on the application of his client.

IN this case a testamentary suit had been instituted for the purpose of trying the validity of the last will and testament of Margaret Ann Carter, the daughter of the defendant Elizabeth Carter. It came on for hearing before Sir J. Hannen and a special jury, on the 1st of March, 1873, when a compromise was entered into by the counsel for Mrs. Carter, the defendant, who had given them a written authority for that purpose, to the following effect: "The will to be

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proved. The plaintiffs to pay the defendant Elizabeth Carter the sum of 4550*l.* and to secure to her an annuity of 300*l.* per annum for her life, to be charged upon the Fincham estate; to pay her attorney 700*l.* for his agreed costs. Also to pay Messrs. Langley & Gibbon, on the authority of the defendant Elizabeth Carter, 750*l.* on behalf of their clients in full satisfaction of their claims and costs. The above-mentioned sums, amounting to 6000*l.*, to be paid within one month of probate. Annuity to commence from the 1st of January, 1873." Subsequently, the defendant Mrs. Carter, being dissatisfied with the terms of compromise entered into on her behalf, determined to appoint Messrs. Keighley & Gething her attorneys in the place of Mr. Grantham Robert Dodd, her then attorney; and accordingly an order to that effect was made in the registry on the 11th of March, 1873. On the 18th of March a further order was made referring to one of the registrars to ascertain the amount of costs due to Mr. Dodd after credit had been given for all sums paid to him on account thereof, and directing that on the payment of such costs the papers of the defendant Mrs. Carter should be delivered over to Messrs. Keighley & Gething as her attorneys. On the 26th of March, a further order was made, directing Mr. Dodd to file his bill of costs within fourteen days, and he filed it on the 20th of June. It amounted to 710*l.* An appointment for taxation was made for the 8th of July before Mr. Registrar Strong; but Mr. Dodd on that occasion objected to any taxation taking place, by reason that his costs had been paid by the plaintiffs in the suit, and the registrar referred the matter to the Court. The sum of 700*l.*, the amount of Mr. Dodd's agreed costs, had been paid by the plaintiffs on the 31st of May, 1873, and a receipt taken from him for them. It was admitted that during the course of the proceedings Mr. Dodd had received on account of Mrs. Carter a sum of 400*l.*

W. G. Harrison moved the Court to order that the bill of costs, charges, and expenses delivered to Mrs. Carter by Mr. Dodd shall be taxed by one of the registrars in accordance with the order made on the 18th of March, 1873, notwithstanding the objection to such taxation taken by Mr. Dodd before Mr. Registrar Strong on the 8th of July, 1873, or to make such further or other order

with reference to the taxation of the said bill of costs as to the Court should seem just. The agreement contained in the compromise was not with Mr. Dodd, but with the defendant Mrs. Carter and for her benefit; and Mr. Dodd has no right to claim against her more than his taxed costs.

Pritchard, for Mr. Dodd, was stopped by the Court.

SIR J. HANNEN. I quite agree with Mr. Harrison that the compromise cannot be regarded as an agreement with Mr. Dodd for his own benefit, but as an agreement between the parties to the suit; and it is on that account that I think Mrs. Carter is not entitled to have this bill submitted to taxation. It is an agreement in law between her and her opponents, wherein she agreed to stop the litigation on her opponents paying (amongst other things) her attorney 700*l.* for his agreed costs, which has been done. It is the same as if she had received 700*l.* with one hand and paid it over to her attorney with the other, and so comes under the ordinary rule that all bills which have been once paid cannot afterwards be taxed, except under special circumstances. I asked Mr. Harrison what were the special circumstances in this case, but he could give me none. It may be that the sum claimed is rather more than what would be allowed on taxation, but an agreement of this kind ought not to be set aside unless there is reasonable ground to suppose that a serious wrong has been done. I have said that this is an agreement between the parties; but if it could be shewn that Mr. Dodd had taken advantage of his position to advise his client to come to an arrangement by which he would largely benefit to her detriment, I might re-open the matter; but in the absence of special circumstances the arrangement as entered into by counsel must remain. The sum of 400*l.* received by Mr. Dodd on behalf of Mrs. Carter, or such portion of it as has not been already paid to her or by her authority, to be repaid. The motion is rejected with costs.

Attorneys for Mrs. Carter: *Keighley & Gething.*

1873
March 18.

GROSSI *v.* GROSSI.

Judicial Separation—Cruelty of Husband—Adultery of Wife.

The Court refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the Court:—

Quære, whether the Court can in any case grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery.

THIS was a wife's petition against a husband for dissolution of marriage on the grounds of incestuous adultery and cruelty. The husband denied these charges, and the cause was heard by the Judge Ordinary, without a jury, on the 29th of January.

Being of opinion that the charge of incestuous adultery was not proved, the Judge Ordinary refused a decree nisi for dissolution, but pronounced a decree of judicial separation on the ground of cruelty. A rule nisi was afterwards obtained by the respondent calling on the petitioner to shew cause why this decree should not be rescinded and the petition dismissed on the ground that it was proved on the hearing that the petitioner had been guilty of adultery. The facts of the case sufficiently appear from the judgment.

March 11. *Moody* shewed cause, and cited *Seller* v. *Seller* (1); *Coleman* v. *Coleman* (2); *Hall* v. *Hall* (3); *Best* v. *Best*. (4)

Searle, in support of the rule. It is not the practice in contested cases where a counter-charge is established to allow a petition for dissolution to be amended by substituting a prayer for judicial separation: *Boreham* v. *Boreham*. (5) A wife who is found guilty of adultery is not entitled to a decree of judicial separation under any circumstances. In no case has a decree been pronounced at the instance of an adulterous wife either in this or in the Ecclesiastical Court. Where the adultery of the petitioner in a suit for dissolution has been established, the Court has invariably, in the exercise of its discretion, dismissed the petition.

(1) 1 Sw. & Tr. 482; 28 L. J. (P. M. & A.) 99.
(2) Law Rep. 1 P. & M. 81.
(3) 32 L. J. (P. M. & A.) 117.
(4) 1 Add. 411.
(5) Law Rep. 1 P. & M. 77.

He cited *Dillon* v. *Dillon* (1); *Chambers* v. *Chambers* (2); *Foster* v. *Foster*. (3)

March 18. THE JUDGE ORDINARY. This was a suit for dissolution of marriage brought by a wife against a husband on the ground of incestuous adultery coupled with cruelty. The cruelty put forward in the first instance, and apparently made the leading feature in the case, was that the husband coerced the wife into submitting to the embraces of another man. I thought that charge entirely failed, and I came to the conclusion that the wife had been a consenting party to the commission of adultery with the person named. I also came to the conclusion that the charge of adultery against the husband was not proved. But on the evidence before me, it appeared that he had been guilty of an act of violence. It was an isolated act, but one of so serious a kind that he was bound over to keep the peace for twelve months, and failing to obtain sureties, he was actually kept in prison for that time. Being of opinion that the charge of cruelty was established by this assault, I pronounced a decree of judicial separation on that ground. It did not occur to me, and I was not reminded that it had been proved incidentally in the course of the case, that the wife had been guilty of adultery, and as I negatived the coercion attributed to the husband, it followed that she was without excuse for that adultery. I have now been asked to vary the decree of judicial separation on the ground of the adultery of which the wife was proved to have been guilty, and I consider that I am at liberty to do so. I consider myself now in the same position as if the matter had been brought to my attention at the hearing.

It has been contended, that in no case can a wife who has been guilty of adultery obtain a decree of judicial separation on the ground of her husband's cruelty. During the argument I expressed my unwillingness to come to such a conclusion. Many cases might be suggested in which a very serious wrong would remain unredressed if it were impossible for a wife in such a state of things to obtain the protection of this Court. A profligate husband might, by the grossness of his conduct, lead his wife to infidelity, and might then, if so disposed, make use of all the

(1) 3 Curt. 86. (2) 1 Hagg. Const. 439. (3) 1 Hagg. Const. 144.

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means in his power to torture her morally and make her life a burden to her and inflict serious injury upon her health, without committing any actual assault for which she could obtain relief in another Court.

I am unwilling to say, until it becomes necessary, that in no such case has this Court power to grant redress. It was urged that this Court never has granted such relief to a wife guilty of adultery. That may be so, but it has not been determined that in no case can the Court do so. But my reason for not deciding the point now is, that I do not consider this to be such a case as I have shadowed out. I have come to the conclusion that this is not a case in which the wife stands in need of the relief which this Court is able to give to a woman suffering from her husband's cruelty. It is a case in which a prostitute having fallen in with a man in the streets, induced him in a day or two to contract a marriage with her, and in a short time, probably as soon as his funds were exhausted, she returned to her former paramour. It may be doubtful whether she did so with her husband's consent —but that it was of her own free will I entertain no doubt. After a time the husband, irritated probably by the loss of his money, which, as he alleges, she had taken and squandered, made the assault upon her for which he was imprisoned. But he does not appear to have renewed his attack upon her nor to have sought to cohabit with her again. I therefore see no reason to suppose that she stands in need of the assistance of the Court—and as she has been proved to have committed adultery, I now make the order which I should have made at the hearing if the facts had been fully brought to my attention, that is to say, I dismiss the petition.

Solicitor for petitioner: *T. Sampson.*
Solicitor for respondent: *J. R. F. Rogers.*

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1873
July 15.

Suit for Dissolution of Marriage—Cruelty and Adultery—Previous Suit for Judicial Separation on the Ground of Adultery—Judicial Separation granted.

A woman, who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the cohabitation.

ANNE JANE GREEN petitioned the court for a dissolution of her marriage with John Green, of Kingston-upon-Hull, Yorkshire, by reason of his adultery coupled with cruelty. This petition was dated the 1st of February, 1872, and alleged a marriage between the parties on the 20th of December, 1866, various acts of cruelty committed by the respondent previously to the month of October, 1867, when the parties finally separated, and an adulterous cohabitation between the respondent and Fanny Rachel Wright from December, 1868, until the date of the petition. It also appeared that on the 30th of January, 1868, the petitioner had presented a petition to this court praying for a judicial separation from her husband by reason of his adultery with certain prostitutes at Hull in the year 1867 and in January, 1868, and a decree in her favour had been made on the 27th of November, 1868. The respondent did not appear in either suit.

At the hearing on the 22nd of January, 1873, evidence was given which satisfied the court that the respondent had been guilty both of the adultery and cruelty alleged against him; it was also proved that after the judicial separation had been decreed the respondent had called upon the petitioner's father and admitted that he had been a cowardly and dastardly husband, and that no excuse could be offered for his conduct. He promised to reform, and asked if his wife would return to him. He was told she would if he continued to lead a respectable life.

Dr. Spinks, Q.C., and *Dr. Tristram*, appeared for the petitioner.

THE JUDGE ORDINARY. If a wife, having sufficient grounds to ask for a dissolution of marriage, declines to bring a suit for that

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purpose, but contents herself with a judicial separation, can she afterwards proceed for a divorce?

Dr. Spinks, Q.C. There is nothing in the Act of Parliament to prevent her doing so. The exceptions in the 30th and 31st sections (20 & 21 Vict. c. 85) do not include such a case.

THE JUDGE ORDINARY. The delay may be a bar in the discretion of the court to such a suit. In this case some time elapsed before the petitioner changed her mind.

Dr. Spinks, Q.C. The delay referred to in s. 31 is unreasonable delay; but the grounds of the delay in this case were not unreasonable. The petitioner in the first instance did not desire her marriage to be dissolved. She hoped there might be a reconciliation with her husband on his abandoning his evil ways. When she found he would not do so, she presented this petition. This court will rather encourage than discourage such a proceeding. He referred to *Smallwood* v. *Smallwood* (1); *Tollemache* v. *Tollemache.* (2)

THE JUDGE ORDINARY. It is a question of great importance, and requires very grave consideration, whether a party having wilfully abandoned a remedy he or she had, may at a later period, many years afterwards, have recourse to the same proceedings he or she might at the earlier period have taken. I desire that the matter should be fully argued, and, therefore, under 23 & 24 Vict. c. 144, s. 5, I shall direct the papers in the cause to be forwarded to the Queen's Proctor in order that he may instruct counsel for that purpose.

June. 17. *Sir J. D. Coleridge, A.G., Dr. Deane, Q.C.,* and *Searle,* appeared for the Queen's Proctor. They submitted that the petitioner cannot be permitted to bring forward charges now which she might have done in the first suit. A wife cannot split up her ground of complaint and vex her husband by bringing forward a second case on the same materials that might have

(1) 2 Sw. & Tr. 397; 31 L. J. (P. M. & A.) 3.

(2) 1 Sw. & Tr. 557; 30 L. J. (P. M. & A.) 113.

been used in the first instance. When an application is made to amend a petition by adding fresh charges, it is necessary to shew that the facts on which such charges are made are noviter perventa, otherwise the application will be refused. They referred to *Matthews* v. *Matthews* (1); *Cioci* v. *Cioci.* (2)

Dr. Spinks, Q.C., and *Dr. Tristram*, for the petitioner. The petitioner did not claim her full remedy in the first instance because she hoped her husband would reform his conduct. Forbearance on the part of the wife has been held to be meritorious in a long series of cases *Durant* v. *Durant* (3); *D'Aguilar* v. *D'Aguilar* (4); *Beeby* v. *Beeby* (5); *Lady Ferrers* v. *Lord Ferrers* (6); *Angle* v. *Angle* (7); *Dysart* v. *Dysart.* (8) If the petitioner had condoned the previous adultery, she unquestionably would have had a right to proceed for a dissolution of her marriage on the ground of adultery with a second person at a subsequent period. So, also, if she had entered into a deed of separation on the first occasion, she might have come to this court, and, lastly, if she had merely charged cruelty in the first instance and omitted the charge of adultery. It is not a case which comes within the discretionary powers of the Court under the 31st section (20 & 21 Vict. c 85), for the delay which has occurred has not been unreasonable: *Pellew* v. *Pellew & Berkeley* (9); *Cooke* v. *Cooke.* (10)

Cur. adv. vult.

July 15. The JUDGE-ORDINARY. The petitioner in November, 1868, obtained a decree for judicial separation from her husband on the ground of adultery. In February, 1872, she filed a petition for dissolution of marriage on the ground of cruelty committed before the filing of the first petition, and adultery committed since the decree for judicial separation. The question arises upon these facts whether the previous decree sought and obtained by the petitioner, with knowledge of the cruelty now brought forward, precludes her from obtaining relief in these proceedings. It was

(1) 1 Sw. & Tr. 499; 29 L. J (P. M. & A.) 118.
(2) 29 L. J. (P. M. & A.) 60.
(3) 1 Hagg. Ecc. at p. 752.
(4) 1 Hagg. Ecc. at p. 780.
(5) 1 Hagg. Ecc. at p. 793.
(6) 1 Hagg. Const. 130.
(7) 6 No. of Ca. at p. 197.
(8) 1 Roberts. 470.
(9) 1 Sw. & Tr. 553; 29 L. J. (P. M. & A.) 44.
(10) 3 Sw. & Tr. 26; S. C. on appeal, 3 Sw. & Tr. 246; 32 L. J. (P. M. & A.) 81, 154.

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contended by the Attorney-General that the petitioner was not entitled to split her ground of complaint into two parts, and to harass her husband by bringing them forward separately at such times as might suit her purposes. That having facts which entitled her either to a dissolution of marriage or judicial separation, she elected the latter, and ought not now to be permitted to obtain the larger relief which she formerly waived. The fact of the respondent's cruelty was very clearly established. The petitioner stated that the reason for not making a charge of cruelty and praying for a dissolution of marriage in the former petition, was that she loved her husband, and hoped that his heart would change, but that, finding that he was now living in adultery with another woman, she had abandoned the hope of his reformation, and desired the dissolution of her marriage. I saw no reason to doubt the truth of this statement, or that the present proceedings were bonâ fide instituted in consequence of the fresh offence of the husband. The motives of the wife, therefore, in abstaining from charging the respondent with cruelty, and seeking a divorce in the former case are meritorious, and exempt her from the suspicion of having been guilty of unreasonable delay. She is therefore entitled to the favourable consideration of the Court. It is conceded that her conduct does not constitute any one of the absolute or discretionary bars to a decree for dissolution of marriage referred to in the statute; unless, therefore, there is some general principle of law adverse to the petitioner's contention, she is entitled to the relief she asks. After much consideration, I have come to the conclusion that there is no such principle applicable to the case. The maxim that no one shall be twice vexed for the same cause is not in point, for the subject-matter of the two suits, as well as the remedies sought in them, are different. The husband by his adultery subsequent to the former decree has committed a fresh matrimonial offence (for the decree of judicial separation is not to be treated as a licence to commit adultery for the future); and for this offence, aggravated by the previous cruelty, the wife has had no redress. If the failure of the petitioner to charge her husband with cruelty be regarded as an equivalent to the forgiveness of it, still cruelty condoned is revived by subsequent adultery, and I can see no reason why the husband should be in a better posi-

tion because he has already been guilty of a wrong which entitled the wife to relief. I am much influenced by the consideration that upon the same facts the wife would have been entitled to a decree, if she had proved them in a different order. If she had obtained a judicial separation on the ground of cruelty, she might afterwards have obtained a decree for subsequent adultery coupled with the cruelty already proved; and the fact that the respondent had previously been guilty of adultery would not have affected her position. Two cases only were cited in the argument in support of the objection to the petitioner's claim, *Matthews* v. *Matthews* (1), and *Cioci* v. *Cioci*. (2) In the first the Court dismissed a wife's petition for judicial separation on the ground of cruelty because the delay which had occurred, coupled with the fact that the wife had for some time lived apart from her husband in pursuance of a deed of separation, led the Court to the conclusion that the suit was not bonâ fide for the purpose of obtaining protection for the wife, but for some collateral purpose. In the present case I am satisfied that the suit has been instituted bonâ fide, and without unreasonable delay or acquiescence on the part of the wife in her husband's infidelity. In the case of *Cioci* v. *Cioci* (2), it was held that a wife who had obtained a decree for divorce à mensâ et thoro in an Ecclesiastical Court could not maintain a suit for judicial separation on the same grounds. The observations of Sir C. Cresswell in that case must be taken with reference to the facts before him; they are not applicable to the present case, where a different remedy is sought on different facts to those before the Court on the former occasion. For these reasons I think that the petitioner is entitled to a decree nisi, which I accordingly pronounce.

Proctors for petitioner: *Johnson & Coote.*

(1) 1 Sw. & Tr. 499; 29 L. J. (P. M. & A.) 118.
(2) 29 L. J. (P. M. & A.) 60.

1873
July 15.

H. *v.* P., FALSELY CALLED H.

Nullity of Marriage—Incapacity from Nervous Affection—No Inspection of Respondent—Decree Nisi.

In a suit of nullity it appeared, from the husband's evidence, that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, and that, although he had cohabited with her for more than three years, the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband the Judge Ordinary made a decree nisi to annul the marriage under the provisions of the statute 36 Vict. c. 31.

THIS was a suit for nullity of marriage, brought by the husband P. H. H. The petition, which was filed on the 22nd of February, 1872, alleged a marriage to have taken place on the 5th of August, 1868, and cohabitation from the date of the marriage until the 12th of February, 1872; that the petitioner was, at the time of the marriage, twenty-six years of age, and able and desirous to consummate the marriage, but that he had been prevented therefrom by reason of the malformation of the parts of generation of the respondent, or by reason of her incapacity to consummate marriage, arising from nervous affection, and that such malformation or nervous affection is practically incurable by art or skill. The respondent at the time of marriage was twenty-two years of age. The respondent appeared and filed an answer, in which she traversed the averments of the petitioner's capacity or willingness to consummate the marriage, and of her malformation or incapacity. On the 15th of June, 1872, the Judge Ordinary (Lord Penzance) made an order for the appointment of Henry Oldham, M.D., and Arthur Noverre, M.D., as inpectors of the persons of the petitioner and respondent, and the 4th of July, 1872, was fixed upon for the attendance of the parties and the medical inspectors at the registry, but the respondent refused to attend or be inspected.

The case was heard in camerâ on the 1st of May, 1873, when the petitioner gave evidence as follows: "I was engaged to be married to the respondent in 1866 or 1867. We were married in August, 1868. On that night when I attempted consummation the respondent fainted. I dressed and was going for a doctor when she recovered. I then remained quiet for that night. The

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next day we went to Folkestone. She made me promise not to touch her that night. On the third night we were at Brussels. I found the bedroom door locked. I could not enter. We were two nights at Brussels. Then we went to Wiesbaden. We had two beds. I made an attempt to consummate. She put on her dressing-gown and rushed down stairs. She said that if I attempted anything of the sort again she would leave me. We then went to Homburg. We had separate beds in the same room. I tried on two or three occasions to consummate the marriage without effect. We then went to Baden-Baden. I gave her champagne. She first said she would allow me to have intercourse. When I tried she fainted, and on recovery became angry. At my father's house, in Dorset Square, I tried again to consummate. She ran down stairs, and only returned when I promised not to try again. In May, 1869, I sold out of the army. I lived in Albemarle Street with respondent. We lived happily together, except on this point. I still solicited intercourse from time to time, but she gave some frivolous excuse to prevent it. She said "she was tired, or not in the humour." We went to Ryde, and afterwards to Granville Street. She promised to submit to me, if I would take that house. When there I tried, but she ran out of the house and down the street with little on. I afterwards had a conversation with the respondent's mother in her presence. I said I should go my own way because of my wife's conduct. She came in and I asked her, 'How can you make out to your mother that you are my wife?' She said, 'Your conversation is too filthy.' She left the room and slammed the door. We went abroad, and, in 1872, to the Isle of Wight. My solicitations were renewed, but I never succeeded in having connection. I fancy that it was only nervousness, but I cannot say. In February, 1872, I was in a boat coming up to town. I met the respondent. She told me she was coming up to town to have a deed of separation drawn. I have not cohabited with her since." The medical men were examined, and stated the result of their inspection of the petitioner.

Staveley Hill, Q.C., and *Dr. Tristram*, appeared for the petitioner. They referred to *Pollard, falsely called Wybourn*, v. *Wybourn* (1);

(1) 1 Hagg. Eccl. 725.

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Sparrow, falsely called Harrison, v. *Harrison* (1); *Greenstreet, falsely called Cumyns*, v. *Cumyns* (2); *U.* v. *F.* (3); *B.* v. *L., falsely called B.* (4); *G.* v. *G.* (5)

C. A. Middleton appeared for the respondent.

July 15. THE JUDGE ORDINARY. I have had great difficulty in this case, arising from the fact that the wife has not presented herself as a witness, and has refused to submit to inspection. I have therefore nothing to go upon but the evidence of the husband, and he has not been cross-examined. The conclusion I have come to is, that there is nothing on the surface of the case which would justify me in withholding credence from the husband's statements. The result is, he proves that there has been more than three years' cohabitation, and that there has been no consummation of the marriage. There does not seem to be any structural impediment to the consummation, but it is practically impossible. I agree entirely with what Lord Penzance said in *G.* v. *G.* (5), on a similar state of circumstances. The rule appears to be this: the impediment in the way of intercourse must be physical, and it must not arise from the wilful refusal of the wife to submit to her husband's embraces. In the present case, whenever the husband endeavoured to consummate the marriage the act brought on hysteria, so that he could not effect his purpose without employing such force as, but for the marriage, would have amounted to rape. Every feeling is arrayed against the idea of a husband having recourse to such violence. If then the husband finds it impossible to have connection with his wife, except upon such conditions, it is practically impossible for him to have any connection at all. In the absence of any counter-statement on the part of the wife, and taking the husband's account to be correct, I think he is entitled to a decree. That decree, however, will not be, as it would have been a short time ago, final, but in accordance with a recent statute, 36 Vict. c. 31, it will be, in the first instance, a decree nisi.

Attorney for petitioner: *A. T. Hewitt.*

Proctors for respondent: *Shephard & Skipwith.*

(1) 3 Curt. 16.
(2) 2 Phillim. 10.
(3) 2 Roberts. 614.
(4) Law Rep. 1 P. & M. 639.
(5) Law Rep. 2 P. & M. 287.

TOWNSEND *v.* TOWNSEND.

1873
August 5.

Desertion.

A husband having committed several thefts, separated from his wife with her knowledge and consent, for the purpose of avoiding arrest. He was afterwards arrested and imprisoned, and, having committed other thefts after his release, he was on subsequent occasions again imprisoned. Whilst he was in prison, and also in the intervals between his imprisonments, he kept up a correspondence with his wife and made repeated endeavours to induce her to return to cohabitation. She refused, and the cohabitation was never resumed. The wife having presented a petition for dissolution on the ground of adultery coupled with desertion, the Court held that there was no desertion, the separation being involuntary on the part of the husband.

THIS was a petition by a wife for dissolution of marriage on the ground of adultery coupled with desertion for two years and upwards. The respondent did not appear, and the cause was heard before the Judge Ordinary. The adultery was proved, but a question arose as to the desertion. The facts are fully stated in the judgment.

Inderwick, for the petitioner, cited *Mallinson* v. *Mallinson* (1); *Re Bartlett* (2); *Gibson* v. *Gibson* (3); *Lawrence* v. *Lawrence*. (4)

Cur. adv. vult.

Aug. 5. THE JUDGE ORDINARY. The petitioner was married to the respondent in March, 1864. The respondent was then in a fair way of business as a draper, but he appears soon to have got into difficulties through betting, and he committed several thefts to supply himself with money. His father-in-law, whom he had robbed on one or two occasions, settled some of the charges against him by payment; but at length, in November, 1866, in consequence of a fresh theft, the respondent left his home to avoid arrest. Before leaving he confessed his guilt to the petitioner, and informed her of the necessity he was under of concealing himself. On the 15th of November he had been arrested, and wrote to the petitioner a penitent letter from

(1) Law Rep. 1 P. & M. 93.
(2) 3 Ex. 28; 18 L. J. (Ex.) 25.
(3) 29 L. J. (P. M. & A.) 25.
(4) 2 Sw. & Tr. 575; 31 L. J. (P. M. & A.) 145.

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Manchester Gaol. He was shortly afterwards tried and convicted, and sentenced to a term of imprisonment which expired on the 5th of April, 1867. While in prison he wrote several affectionate letters to his wife, who had returned to reside with her parents at Birkenhead. Immediately on his release he went to Birkenhead, saw his wife, and begged her to return to him. This, by the advice of her friends, she refused to do until he was in a position to support her. He thereupon obtained employment in Liverpool. He continued to correspond with the petitioner, and renewed his request that she would return to him. This, however, she would not consent to, but she frequently visited him and took their son to see him.

In June, 1867, he was again found guilty of larceny and was sentenced to two years' imprisonment. While in prison he frequently wrote to his wife, but she did not answer his letters. His term of imprisonment expired on the 30th of June, 1869. In July he wrote to her, giving her an account of his doings and prospects, and reminding her of her promises to return to him if he found her a home, and in October he went to Birkenhead for the purpose of inducing her to resume cohabitation with him. She, however, refused to have any interview with him, and conveyed to him by her mother her determination not to live with him. In June, 1871, he was again convicted of larceny and sentenced to seven years' penal servitude.

It was proved that he committed adultery with a prostitute immediately before his arrest. In these circumstances it was contended that the respondent was guilty of adultery coupled with desertion without reasonable excuse for two years and upwards.

I have considered the case with a great desire to afford the petitioner the relief she seeks, if I could do so consistently with the decisions by which a judicial interpretation has been put upon the term desertion, but I have found myself unable to do so. It is essential to the constitution of desertion that there should be a voluntary abandonment by the husband of the society of the wife against her will. In the present case the original withdrawal of the respondent from his home was with the knowledge and consent of the petitioner for the purpose of concealment from those in

search of him. He never afterwards voluntarily absented himself from her, but was prevented rejoining her either by his imprisonment or by her refusal to resume cohabitation. That refusal was certainly justifiable; but as it was not founded on any matrimonial misconduct of the husband, the separation which resulted cannot be regarded as voluntary on his part. If he had been living in adultery with another woman, his persistence in such a connection would have been the strongest evidence of an intention to abandon his wife; but the relapses of the husband into a criminal course of life do not in themselves afford such evidence. The case which, in its circumstances, most resembles the present, is that of *Lawrence* v. *Lawrence* (1), where the husband, having accepted employment abroad, afterwards led an extravagant life and was found guilty of embezzlement. The Court in that case came to the conclusion from the respondent's conduct, and from a letter which he wrote to a woman with whom he had formed an adulterous connection, that he had the intention never to return to his wife. In the present case the letters of the respondent, and his repeated endeavours to resume cohabitation with his wife, lead to the conclusion that he never intended to desert her, but, on the contrary, always desired to live with her. I am, therefore, constrained to hold that the charge of desertion has not been established, and the Court can only grant, if that be desired, a decree of judicial separation.

Decree of dissolution refused, and decree of judicial separation granted.

Solicitors: *Vizard, Crowder, & Co.*

(1) 2 Sw. & Tr. 575; 31 L. J. (P. M. & A.) 145.

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June 3.

FLOWER *v.* FLOWER.

Wife's Costs of Unsuccessful Suit.

The Court has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, although security for such costs has been deposited in the registry by the husband, but it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground.

THIS was a wife's petition for judicial separation on the ground of cruelty. The respondent in his answer traversed the charge of cruelty, and alleged that a deed of separation was executed on the 19th of May, 1870, under which he had lived apart from the petitioner, and had paid her an allowance of 60*l.* per annum for her maintenance; and that the petition was filed not for the purpose of obtaining the protection of the Court, but for the purpose of extorting from the respondent a larger amount of maintenance than was secured by the deed of separation. The petitioner in her replication traversed the latter allegation, and as to the deed of separation alleged that she was forced to execute it by the threats and violence of the respondent. The cause was heard by the Judge Ordinary without a jury on the 8th of May. The Judge Ordinary on the 13th of May delivered judgment, and being of opinion that the petitioner had failed to establish the charge of cruelty, dismissed the petition.

June 3. *Dr. Tristram*, for the petitioner, moved that the wife's taxed costs of the hearing might be allowed up to the amount (60*l.*), for which security had been deposited in the registry under rule 158. He read an affidavit made by the petitioner's attorney for the purpose of shewing that before instituting the suit he had done everything in his power to satisfy himself that the petitioner's case was genuine. The cases of *Wells* v. *Wells* (1), *Rogers* v. *Rogers* (2), *Clark* v. *Clark* (3), and *Heal* v. *Heal* (4) were cited.

Dr. Spinks, Q.C., for the respondent, opposed the motion. He

(1) 1 Sw. & Tr. 308.

(2) 4 Sw. & Tr. 82; 34 L. J. (P. & M.) 87.

(3) 4 Sw. & Tr. 111.

(4) Law Rep. 1 P. & M. 300.

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made no imputation upon the conduct of the petitioner's attorney, but submitted that the petitioner, having accepted a deed of separation, ought not to have put her husband to the expense of a suit, especially as the evidence of cruelty on which she relied was very weak. He cited *Jones* v. *Jones*. (1)

THE JUDGE ORDINARY. If the question of costs were a question solely between husband and wife, it would be reasonable that a husband who had successfully rebutted a charge brought against him by his wife should not be obliged to pay her costs. But unfortunately in the vast majority of cases the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing him she would be powerless, and however good a cause she might have for taking proceedings, she would be unable to enforce her rights. Therefore it is necessary to take into consideration the position of the attorney, and provision is made for his payment by enabling the wife to call upon the husband to give security for her costs of the hearing to the amount that may be fixed by the registrar. That course was taken in this case, and the amount of security was fixed at 60*l*.; and the wife's attorney undertook the litigation on her behalf, in the anticipation that he would be allowed his costs out of that sum for which security had been given. By not allowing the costs the Court would be depriving the attorney of that which he looked to, and had a right to look to, as his security in conducting the litigation on the wife's behalf. It is plain that the Court is not absolutely bound to give the wife her costs, but it would only be justified in refusing them in cases where it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is, where he had the means of seeing before instituting the suit that it was one which ought not to be instituted. When such a case raises I will disallow the wife's costs, and thus cause the punishment to fall on the attorney; but the circumstances of the present case are not such as to deprive the attorney of his right to look to the husband for security for the wife's costs. The defence which was broadly relied on at the hearing was the deed of separation;

(1) Law Rep. 2 P. & M. 333.

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but I came to the conclusion that it was not in itself a bar, and could only be made use of to assist me in coming to a conclusion as to the real state of the case with regard to the charge of cruelty. With the assistance of the deed of separation I came to the conclusion that the alleged cruelty was not of such a kind as to justify a decree. But the facts were certainly not free from doubt. The husband, in my judgment, had been guilty of very unbecoming conduct, and had used considerable force in turning the wife out of their common bed-room. The wife of course represented to her attorney that he had treated her with considerable personal violence. It would be in the highest degree prejudicial to the interests of the women who are litigants in this Court to cast upon the attorneys whom they consult the dangerous responsibility of coming to a conclusion in doubtful cases as to what is likely to be the finding of the Court upon the facts submitted to them. If I were to disallow these costs I should say in effect that the wife's attorney ought to have come to the conclusion that the charge of cruelty could not be made out. But the attorney ought not, I think, to be compelled to stake his chance of remuneration upon his judgment upon such a question. There having been a fair ground for litigation in the present case I shall not deprive the attorney of the security to which he had a right to look for his remuneration, and the wife's costs will be allowed up to the amount for which security was given.

Solicitor for petitioner: *E. Mirams.*
Solicitors for respondent: *James, Curtis, & James.*

Nov. 18.

GODRICH *v.* GODRICH.

Judicial Separation decreed—Custody of Children—Intervention of Grandfather—20 & 21 Vict. c. 85, *s.* 35—*22 & 23 Vict. c.* 61, *s.* 4.

After a decree of judicial separation in favour of the party in whose custody children of the marriage have been placed, the Court may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody.

IN the year 1857 Mrs. Godrich instituted a suit for dissolution of marriage against her husband, by reason of his adultery and

cruelty, and in March, 1872, a decree of judicial separation was made in that suit on the ground of cruelty. Under various orders of the Court, the two children of the marriage, Alice Godrich, and Ada Godrich, were educated in France and Belgium at the expense of their grandfather, Mr. Francis Godrich the elder, and their mother from time to time had access to them. On the 23rd of July, 1872, the following order was made: "The Judge having read the statement filed on behalf of the petitioner, and having heard the petitioner and counsel on behalf of the respondent thereon, ordered that the custody of Ada Godrich and Alice Godrich, the two children issue of the marriage of the petitioner and respondent, be delivered over to the petitioner within a fortnight of the service of this order upon the respondent's father, but directed that this order be not put in force provided that the said children be brought to Ostend, or some other place in the vicinity to be agreed upon between the parties, or in default of such agreement, to be named by one of the registrars of Her Majesty's Court of Probate, on the 8th day of August next, and at the end of the second week in October, and do remain with the petitioner a week each time, and further directed that the order be served upon the respondent's father and respondent's solicitor, but that if the said children be not brought to the petitioner, as aforesaid, at either of the aforesaid dates and times, the order for the delivery over of the custody of the said children to the petitioner be at once acted upon." After consideration, Mr. Godrich, senior, determined to comply with the first part of the order, and in the month of September, 1872, delivered over the children to their mother in the office of her solicitor.

Nov. 11. *Dr. Swabey* moved, on behalf of Mr. Godrich, senior, for liberty to intervene in the suit on behalf of Alice Godrich, one of the children (the other child, Ada, having attained the age of sixteen years), in order that he might apply to have the order of the 23rd of July, 1872, discharged or varied, and that Alice Godrich should be committed to his custody, he being willing to maintain and educate her. The affidavit on which he founded the motion, stated certain circumstances in the conduct of Mrs. Godrich, which made it advisable the child should be removed, more especially that

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she had not been sent to school, and seldom to any place of worship, since she had been under her mother's care. He referred to *Chetwynd* v. *Chetwynd.* (1)

[The JUDGE ORDINARY. That was a case of dissolution of marriage. Have I any authority to allow the intervention of a third party after a final decree for judicial separation?]

The 22 & 23 Vict. c. 61, s. 4, authorizes this Court, after such final decree, to make orders as to the custody, maintenance, and education of the children. The decision in *Chetwynd* v. *Chetwynd* (1) was founded on the words of that section, and is of very general application, and the reasoning is as applicable to cases of judicial separation as of dissolution of marriage.

[The JUDGE ORDINARY. The question is whether, independently of the statute, I have a general power to allow third persons to intervene in cases of judicial separation. I must consider on what principle I can limit the extent of s. 4 of 22 & 23 Vict. c. 61.]

Cur. adv. vult.

Nov. 18. The JUDGE ORDINARY. I have looked into the authorities, and have no doubt that I have power in this case to allow an intervention on behalf of the children for their interest. I therefore grant the motion.

Attorney for Mr. Godrich, senior: *Graham.*

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Jan. 20.

FITZGERALD *v.* FITZGERALD.

Dissolution of Marriage—Decree Nisi—Variation—23 & 24 *Vict. c.* 144, *s.* 7—29 *Vict. c.* 32, *s.* 3.

The Court having directed a decree nisi to issue for dissolution of marriage to be made absolute at the end of six months, under special circumstances allowed such decree to be varied by the introduction of the word "three" instead of the word "six," and in its discretion reduced to three months the time fixed for making such decree absolute.

IN the year 1861 Mrs. Charlotte Georgina Fitzgerald petitioned the Court for Divorce for a dissolution of her marriage

(1) 4 Sw. & Tr. 151; 34 L. J. (P. M. & A.) 130.

with the respondent, William Henry Dominick Fitzgerald, by reason of his adultery and cruelty. The issues raised on her petition were tried before the Judge Ordinary (Sir J. P. Wilde) and a special jury in Michaelmas Term, 1863, and the jury found a verdict for the respondent on both the issues of adultery and cruelty. A motion for a new trial was rejected by the Judge Ordinary, and, on appeal, by the full Court (1) and the petition was dismissed. In 1867, Mrs. Fitzgerald again petitioned the Court for a dissolution of her marriage by reason of her husband's adultery and desertion. The respondent appeared but did not answer the petition. On the 27th of November, 1868, the cause was heard before the Judge Ordinary (Lord Penzance), and he held that the charge of adultery was proved, but not that of desertion, and he offered to make a decree for judicial separation, which was declined by the petitioner. (2) Subsequently a re-hearing was granted on the application of the petitioner, but the Judge Ordinary directed that the Queen's Proctor should intervene, and at the re-hearing Sir R. P. Collier, A.G., Dr. Spinks, Q.C., and Archibald appeared for him. The Judge Ordinary confirmed his previous decision, and again offered to grant to Mrs. Fitzgerald a judicial separation. On 19th October, 1872, the petitioner filed a third petition, praying for a dissolution of her marriage with the respondent by reason of his adultery and desertion. The respondent entered an appearance to the citation, but did not file an answer to the petition. By direction of the Court notice was given to the Queen's Proctor of the institution of this suit, and on the 3rd of December, 1872, he obtained leave to intervene. On the 13th of November, 1873, the cause was heard before the Judge Ordinary (Sir J. Hannen), who held that both adultery and desertion had been proved, and he made a decree nisi for dissolution of the marriage, to be made absolute at the expiration of six months.

Dr. Swabey, on behalf of Mrs. Fitzgerald, moved the Court to allow a variation to be made in the decree nisi, so that she might apply to the Court for a decree absolute at the expiration of three months from the date of the decree nisi. As the Queen's Proctor intervened in the earliest stage of the last suit, and also in the

(1) 3 Sw. & Tr. 400. (2) Law Rep. 1 P. & M. 694.

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previous one, a thorough investigation of all the circumstances of the case has been had, and the object of suspending the final decision has been attained. By 29 Vict. c. 32, s. 3, a decree nisi shall not be made absolute until after the expiration of six months, unless the Court shall, under the power vested in it, fix a shorter time. That power was vested in it by 23 & 24 Vict. c. 144, s. 7, which authorizes the Court to make a decree absolute after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by general or special order from time to time direct. He referred to *Watton* v. *Watton & Oastler*. (1)

Dr. Spinks, Q.C., for the Queen's Proctor, did not oppose the application. It is questionable, however, whether the Court has a power to alter a decree already made, and to convert the word "six" into "three." The power given by 23 & 24 Vict. c. 144, s. 7, is one to increase and not to lessen the period limited by that Act.

THE JUDGE ORDINARY. In the second Act the power of the Court is recognised to fix a shorter period than six months, and I consider that under ordinary circumstances I can fix such less period, so that it is at least three months. But the doubt I have is whether I should vary an order already made, by which I have fixed the longer interval before I will make the decree absolute. It occurs to me that, although a matter may have been fully sifted under the care of the Queen's Proctor, still, as there are cases in which other persons besides the Queen's Proctor have a right to intervene, a change subsequent to the decree nisi might have the effect of depriving them of the opportunity of exercising that right. I consider I have the power of varying a decree already made, and it is merely a matter of discretion whether I should do so. In the exercise of that discretion I must bear in mind the great delay that has been occasioned in the completion of the suit in this case. On the whole I see no harm in directing that the decree nisi be made absolute at the end of three months, and by varying my previous order to that extent.

Attorneys for Mrs. Fitzgerald: *Humphreys & Morgan.*

(1) Law Rep. 1 P. & M. 227.

IN THE GOODS OF BURCHMORE. 1873 Nov. 11.

Administration—Next of Kin—Minor Children—Nearest Relatives abroad—Guardianship—Citation.

The nearest relatives of the minor children of a deceased having been abroad for many years without having communicated with their friends in this country, the Court permitted the children to elect another person to take administration on their behalf of the estate of their father, without citing such nearest relatives in the first instance.

JOHN NORTON BURCHMORE died on the 10th of June, 1873, leaving a widow, Annie Burchmore, who died on the 21st of July, 1873, without having administered to his effects, and six minor children, the eldest being eighteen years of age, and one infant child. The next of kin of the minors were Thomas Burchmore, who had gone to Natal twenty-one years previously, and had not been heard of by any member of the family for seven years, and William Burchmore, who had gone to Sydney, New South Wales, sixteen or seventeen years previously, and had not been heard of for eleven years. The minors had elected Charles Norton, their first cousin once removed, as their guardian, to take administration on their behalf of the effects of their father, and he was willing to accept the guardianship. The property consisted of household furniture, and a sum of 1600*l.* at interest. It was necessary to receive this last sum at once, and to give a discharge for it, and also to make provision for the maintenance of the children.

Dr. Middleton moved the Court to order administration to issue to the guardian elected by the minor children without first citing their next of kin to accept such guardianship. He referred to *In the Goods of Widger* (1); *In the Goods of M. Weir.* (2)

SIR J. HANNEN granted the motion.

Proctor: *Ring.*

(1) 3 Curt. 55. (2) 2 Sw & Tr. 451.

1873
Nov. 11.

In the Goods of HUGHES.

Administration—Widow and Next of Kin—Widow received her share of Estate—20 & 21 Vict. c. 77, s. 73.

16 L.T. 408

The deceased having died in India, his property was administered by the Administrator-General there, who paid one moiety of the available funds to the widow, who was resident in India, and transmitted the other moiety to this country for distribution amongst the parties entitled thereto at the time of the deceased's death. The Court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the goods of the deceased to one of such parties limited to the property transmitted to this country by the Administrator-General.

James Lewis Hughes, a sub-conductor in the Department of Public Works in India, died at Lucknow on the 22nd of May, 1865, intestate, leaving surviving him a widow, Elizabeth Hughes (resident in India), Catherine Hughes, his mother, and only next of kin, and the Reverend J. Gwynne Hughes and two others since deceased, his natural and lawful brothers, the persons entitled to his estate. In June, 1873, the Reverend J. Gwynne Hughes read an advertisement in the *Daily Telegraph*, by which he was informed that, amongst other sums remitted by the several Administrators-General in India to the Secretary of State for India in Council for payment, in accordance with the provisions of the Regimental Debts Act, 1863, and which remained unclaimed, was one of 1015*l.* 4*s.* 11*d.* belonging to the estate of Sub-conductor J. L. Hughes, Bengal. On inquiring at the India Office he was further informed that one moiety of the estate of Sub-conductor Hughes had been paid over in India to his widow, and that the remaining moiety belongs to his next of kin surviving at the date of his death, and is payable to the legal representative of the deceased.

Dr. Middleton moved the Court to grant administration to Reverend J. Gwynne Hughes, who, besides being entitled to one share himself, is representative of his mother deceased, and is supported by the representative of one of his deceased brothers. The Court has power to pass over the widow under special circumstances, and it has been held that where the widow has already received her share, or barred herself of all interest in her hus-

band's estate, that is a sufficient circumstance to justify the Court in exercising its discretion in favour of the next of kin: *Walker* v. *Carless.* (1)

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SIR J. HANNEN declined to make a general grant to the applicant; but, under 20 & 21 Vict. c. 77, s. 73, made a grant to him, limited to the sum of 1015*l.* 4*s.* 11*d.* transmitted to this country by the Administrator-General in India.

Proctor: *Ring.*

ADAMSON AND ADAMSON *v.* HAMMOND AND OTHERS.

Dec. 2.

Testamentary Suit—Married Woman's Will—Costs out of Estate—Separate Estate not liable to such a Charge.

A married woman, having a power of appointment over certain funds, executed the same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, and by him transferred to the trustees of a settlement made in anticipation of the marriage of his adopted daughter. The husband survived his wife, but did not prove her will, and died possessed of property of only nominal value. Subsequently his representative propounded the will of the married woman, and was opposed by her next of kin. A copy of it was pronounced for, and the costs of the next of kin ordered to be paid out of the deceased's estate:—

Held, that there was no property out of which such costs could be paid.

BY an indenture of settlement, bearing date the 25th of September, 1832, made on the marriage of Mary Lilburn, then Mary Magee, with George Lilburn, a sum of 1700*l.* secured on a promissory note, and a sum of 900*l.*, 4*l.* per cents. (the property of Mary Magee), were assigned to trustees upon trust, after marriage, to pay the interest thereof to such persons as Mary Lilburn should direct or appoint, but not by way of anticipation, and in default of appointment or direction to her for her sole use and benefit, independently of her husband, and in the event of Mary Lilburn dying in the lifetime of her husband, then in trust from and after her decease for such person as she should by deed or will appoint; and in default thereof for such person or persons as at the time of her decease should be, or would have been, her next of kin under the statute of distribution, if she had died unmarried and intestate.

(1) 2 Lee, Eccl. 560.

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In December, 1851, the trustees under the settlement were James Robertson and Alexander Jock, and the trust money invested in their names, a sum of 1900*l.* new 3¼ per cent. annuities, and on the 31st of December, 1851, they transferred this sum into the name of George Lilburn, the husband of Mary Lilburn, and it was added to a further sum of 3300*l.* like annuities standing in his name, making the total 5200*l.* new 3¼ per cent. annuities in his name. On the 19th of March, 1851, Mary Lilburn executed a will, in which she left the whole property over which she had a power of disposition to her husband, George Lilburn, and appointed him sole executor. She died on the 12th of February, 1854, but her husband never proved her will, and it was presumed he had destroyed it, as it was not afterwards forthcoming. She never executed by deed the power of appointment reserved to her by her marriage settlement. In September, 1866, George Lilburn being anxious to make provision for Joan Fanny Henderson, his great-niece and adopted daughter, who had resided with him and at his expense for many years previously, transferred the sum of 5000*l.* new 3¼ per cent. annuities, then new 3 per cent. annuities (which included the above sum of 1900*l.* new 3¼ per cent. annuities) into the joint names of George Lilburn and Joan Fanny Henderson, to the intent that the dividends accruing therefrom shall be received by the said George Lilburn and Joan Fanny Henderson during their joint lives, and on the death of George Lilburn that the entire interest therein should become the property of the plaintiff, Joan Fanny Henderson.

On the marriage of the plaintiffs, Joan Fanny Adamson and Charles Alexander Adamson, in September, 1866, articles of agreement in contemplation of marriage were entered into, dated the 17th of September, 1866, which recited that the lady would be entitled on the death of her great-uncle, the said George Lilburn, to a sum of 5000*l.* new 3 per cent. annuities in the Bank of England, and it was agreed that, in consideration of the said intended marriage, Charles Alexander Adamson would, whenever required to do so, execute a deed of settlement transferring the same to Henry Charles Coote as trustee, or to such other person as the plaintiff, Joan Fanny Adamson, might appoint, to and for her sole use and benefit. On the 28th of November, 1866, after the mar-

riage of the plaintiffs, George Lilburn transferred the said sum of 5000*l.* new 3 per cent. annuities to his own name and those of the plaintiffs. In 1868 this same sum was transferred to Henry Charles Coote and William Jordan, as trustees under an indenture of settlement dated the 7th of February, 1868, but neither at the time of the marriage of the plaintiffs, nor when the said bank annuities were transferred to the names of George Lilburn and the plaintiff, nor at the time when the articles of agreement of the 17th of September, 1866, or the indenture of the 7th of February, 1868, were respectively executed, or at any or either of such times, had either of the plaintiffs, or Henry Charles Coote, or William Jordan, any notice whatever of the settlement of the 25th of September, 1832, or of any claim of the next of kin of Mary Lilburn to any of the property comprised in the said marriage articles or settlement, or to any part of the estate of George Lilburn. George Lilburn died in 1867, and by his will left everything to his great-niece, the plaintiff Joan Fanny Adamson, and appointed her sole executrix. She proved the will, the property being sworn under the value of 100*l.* In January, 1871, the defendant Isabella Hammond, one of the next of kin of Mary Lilburn, and entitled to the funds comprised in Mary Lilburn's settlement in case she had died intestate, filed a bill in Chancery, seeking to make the representatives of the trustees under the marriage settlement responsible for a breach of trust in transferring the trust funds in the manner above mentioned, and the plaintiffs, on the grounds that such funds had come into their possession. On the 24th of January, 1873, that bill was dismissed without costs. In 1871 the plaintiffs propounded a draft of the will of Mary Lilburn, dated the 19th of March, 1851, in this Court, and on the 11th of January, 1872, Lord Penzance pronounced for the draft will as propounded; but as the litigation had been caused by George Lilburn, in having wilfully omitted to prove such will, he ordered the costs of the defendants to be paid out of the estate. On the 15th of April, 1872, an order was made referring to one of the registrars of the Court to ascertain and report to the Court what was the value of the personal estate of Mary Lilburn, the deceased in the cause, at the time of her death, and in what manner the same had been distributed or disposed of,

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and whether there is any and what portion of the estate out of which the costs of the defendants can be paid, and whether any and what portion of such estate is or has been, since the death of the said Mary Lilburn, in the possession of the plaintiffs. The registrar, after referring to the circumstances above set out, concluded: "I have further to report that the value of the personal estate at the time of death was 440*l.* 1*s.* 3*d.*, unless the Court should be of opinion that the sum of 1900*l.* stock, transferred by the said James Robertson and Alexander Jock to the said George Lilburn, must be taken as part of her personal estate, in which case the value would be 440*l.* 1*s.* 3*d.*, and the value at the date of the transfer of the 1900*l.* stock. Of the above sum the said George Lilburn received 440*l.* 1*s.* 3*d.* and no more after the death of Mary Lilburn (the said sum of 1900*l.* having been transferred to him in her lifetime), and there is no evidence that the sum of 440*l.* 1*s.* 3*d.* ever came into the hands of the plaintiffs, or either of them." On this a notice of motion was given on behalf of the defendants, that the Court would be moved to order that the sum of 1900*l.* stock, transferred by James Robertson and Alexander Jock to George Lilburn, in the registrar's report named, be taken and considered as part of the personal estate of Mary Lilburn the deceased, in this cause, and that the costs of the defendants, as directed by the decree of the 11th of January, 1872, can be paid thereout, and that the sum of 1900*l.* stock has, since the death of the deceased, been in possession of the plaintiffs. Further, that the plaintiffs be condemned with the payment of 181*l.* 9*s.* 4*d.*, the amount of the costs of the defendants, and also in the further costs occasioned by the defendants subsequent to the 13th of March, 1872, the day on which the defendants' costs were taxed.

Nov. 4. *Inderwick* and *Whitworth* moved accordingly. The fund over which Mrs. Lilburn had a power of appointment was personal estate, which would have been subject to this order for costs if the husband were still in possession, and would have been liable for debts if the testatrix had in her lifetime done anything to charge it with debts. If property is settled to the separate use of a married woman, without restraint of anticipation, and with a power of appointment at her death, it vests in her for all

purposes, and if she exercises her power by will, it is liable for her debts, and even if the property is only for her separate use for life, if she professes to charge it for her debts, she does so. The expenses of proving the will are on the same footing as debts, and testatrix must be held to have intended to charge them on her separate estate, for the will was waste paper until proved in this Court. Assuming the fund was liable to these costs if in the possession of George Lilburn, could it be followed when it came into the possession of the plaintiffs? George Lilburn was in wrongful possession of the fund when he transferred it into the joint names of himself and the plaintiffs, reserving to himself a life interest therein. He was no party to the settlement made on the marriage of the plaintiffs, although he subsequently transferred the stock into the names of the trustees of the settlement. The settlement was of property belonging to the intended wife for her own benefit; the marriage therefore was not such a consideration as would protect the transfer from being afterwards called in question. They referred to *Johnson* v. *Gallagher* (1); *Shattock* v. *Shattock* (2); *Brickenden* v. *Williams* (3); *Hayes* v. *Oatley* (4); *London Chartered Bank of Australia* v. *Lempriere* (5); *Dilkes* v. *Broadmead* (6); *Burls* v. *Burls* (7); Sugden on Powers, 8th ed. p. 474; Lewin on Trusts, 6th ed. p. 615.

Freeling and *Owen*, for the plaintiffs. In reality, the whole question is concluded by the dealings of George Lilburn with this fund in favour of Mrs. Adamson and her subsequent marriage settlement. The plaintiffs are in the position of innocent purchasers for a valuable consideration, and without notice of the original settlement; the property, therefore, will no longer be subject to liabilities which might have attached to it in the first instance. The trust funds, which it is now sought to charge with these costs, have been sold and disposed of long ago, before the commencement of the proceedings, and to grant this application would be equivalent to making Mr. Adamson personally liable

(1) 3 D. F. & J. 494, 515; 30 L. J. Ch. 298. 7 Jur NS 174
(2) Law Rep. 2 Eq. 182
(3) Law Rep. 7 Eq. 310.
(4) Law Rep. 14 Eq. 1.
(5) Law Rep. 4 P. C. 572.
(6) 2 D. F. & J. 566; 30 L. J. Ch. 268. 7 Jur NS 56
(7) Law Rep. 1 P. & M. 472.

(2) SC 35 Beav 489: 12 Jur NS 405

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for them. Lord Penzance intended that as George Lilburn caused the litigation his estate should pay the expenses, but on the report it appears that he has left no estate. Mrs. Lilburn could not have intended to make a charge on her separate property for a debt not contracted until after her own and her husband's death.

Cur. adv. vult.

Dec. 2. SIR J. HANNEN. This was a suit by Joan Fanny Adamson, executrix of the last will of George Lilburn, deceased, and her husband, wherein the plaintiffs declared, that Mary Lilburn, deceased, who died on the 12th of February, 1854, in the lifetime of her husband, George Lilburn, duly made and executed her will dated the 19th of March, 1851, in exercise of a power given to her by a certain deed of settlement recited in the will, whereby she appointed the said George Lilburn sole executor and universal legatee, that the said will remained unrevoked by the testatrix at the time of her death, and had been since lost, and that the contents were contained in a certain fair copy draft thereof. The defendants, as next of kin of the said Mary Lilburn, traversed the allegations in the plaintiffs' declaration. Upon the hearing of the cause all the issues were found in favour of the plaintiffs, and the Court pronounced for the will as contained in the fair copy draft referred to in the declaration, and ordered that the defendants' costs should be paid out of the personal estate of the deceased Mary Lilburn. On the 15th of April the Court referred it to one of the registrars to ascertain and report what was the value of the personal estate of Mary Lilburn, the deceased in the cause, at the time of her death, and in what manner the same had been distributed or disposed of, and whether there was any and what portion of the estate out of which the costs of the defendants could be paid, and whether any and what portion of the estate was or had been, since the death of Mary Lilburn, in the possession of the plaintiffs. The registrar, on the 31st of October, 1872, reported that there was not then any personal estate of Mary Lilburn, the deceased in the cause, out of which the costs of the defendants could be paid, and that no portion of the said estate had been in the possession of the plaintiffs since the death

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of the said Mary Lilburn. On the 18th of March, 1872, the said report was referred back to the registrar for further consideration. The registrar has now specially stated the facts of the case, and submits to the Court whether, under the circumstances stated, there is any and what portion of the estate of Mary Lilburn out of which the costs of the defendants can be paid, and whether any and what portion of the estate is, or has since the death of Mary Lilburn been, in the possession of the plaintiffs. The facts are fully set forth in the registrar's report, and it is unnecessary for me to recapitulate them. On the argument, I was requested on behalf of the defendants to vary, if necessary, the order of my predecessor, and to order that the defendants' costs should be borne absolutely by the plaintiffs; but I did not feel disposed or at liberty to make the alteration, and the order stands unvaried. Having considered the case, I am of opinion that there is not any portion of the estate of Mary Lilburn out of which the costs of the defendants can be paid, and that no portion of the estate has since the death of the said Mary Lilburn been in the possession of the plaintiffs. It was argued, on behalf of the defendants, that the case fell within the authority of the decision of the Privy Council in the case of *London Chartered Bank of Australia* v. *Lempriere*. (1) There, by a marriage settlement, property was given to a married woman for her separate use for life with remainder as she should by deed or will appoint, with remainders to her executors or administrators. It was held that such a form of gift to a married woman, without any restraint on anticipation, vests in equity the entire corpus in her for all purposes, and that it was liable, after her death and exercise of her power by will, to the payment of her debts, overruling a decision to the contrary effect by the Master of the Rolls in *Shattock* v. *Shattock*. (2) I am of opinion, however, that the decision in the Privy Council is not applicable to the present case. Without dwelling on the difference between the terms of the settlement in that case and the present, it is to be observed that the principle of that decision was, that a woman having separate estate with power of appointment by deed or will, may, by her engagements,

(1) Law Rep. 4 P. C. 572.

(2) Law Rep. 2 Eq. 182. 35 Beav 489. 12 Jur N.S. 405

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bind it as against the appointees under her will. But that falls far short of deciding that an order of this Court made after her death and exercise of her power is to be put on the same footing as an engagement entered into by her. The rights of the several parties were determined at her death, and it is not competent for this Court now to alter them. But, further, I am of opinion that the plaintiffs and the trustees of the settlement of February, 1868, are innocent holders for valuable consideration of the 5000*l.* stock. It is found as a fact that neither the plaintiffs nor the trustees of the settlement of February, 1868, had any notice of the settlement of the 25th of September, 1832. Although it is not expressly found, I entertain no doubt that the articles of agreement dated the 17th of September, 1866, entered into in contemplation of the marriage of the plaintiffs, were entered into with the knowledge and consent of George Lilburn, and that the subsequent transfer by him and the plaintiff Joan Fanny Adamson of the 5000*l.* was made by him for the purpose of enabling that sum to be dealt with as it was agreed by the articles it should be, and as it in fact afterwards was by the deed of the 7th of February, 1868. These several transactions must be treated as one, and together establish an agreement amongst all the parties that the fund should, in consideration of the contemplated marriage of the plaintiffs, be settled, as it ultimately was, for the sole use and benefit of the plaintiff, Joan Fanny Adamson. This is a consideration of the highest kind, and puts the plaintiffs in the position of bonâ fide purchasers of the stock from George Lilburn, and it thereby ceased, and every portion of it ceased to be in the hands of the trustees part of the estate of Mary Lilburn, deceased. It was further contended for the defendants that this was a settlement by Joan Fanny Adamson of funds not derived from her husband for her own benefit, and therefore that the marriage did not constitute such a consideration as to afford protection to the transfer; but I cannot assent to this reasoning. The settlement of this money on the wife was part of the arrangement for which the marriage was the consideration as well on the part of the husband as the wife, and they are both of them entitled to insist upon it as part of the inducement to the marriage, and the fund settled upon that con-

sideration cannot be followed as against the plaintiffs. For this the decision in *Dilkes* v. *Broadmead* (1) is an authority. I make no order as to the costs of this motion.

Attorneys for plaintiffs: *Johnson & Coote.*
Attorney for defendants: *Johnston.*

PEPPERCORNE *v.* GARDNER.

Dec. 16.

Administration—Husband or Wife Survivor—Petition—Practice.

A question whether a husband, who has not been heard of for many years, survived his wife, litigated between the next of kin of the husband and of the wife, may be decided either on a petition or declaration. Objection to either form of procedure is waived by taking any step in the cause.

LUCY ANN RYDER, of Church Street, Stoke Newington, Middlesex, died on the 29th of June, 1865, intestate. She had been previously married to Job Ryder, who had deserted her for several years before her death. On the 5th of June, 1865, Job Ryder called upon her at her residence in Church Street, when she was very ill, and promised to see her again in a month, which he did not do. On the same day he called upon a Mr. Backler, a bootmaker, in whose employment he had been, and deposited with him a bag which he said he would call for in the afternoon. He did not call on that afternoon nor subsequently, and was never afterwards seen or heard of by any of his friends or acquaintances.

The plaintiff, William Allport Peppercorne, is the brother and one of the next of kin of Lucy Ann Ryder, and the defendant, Martha Gardner, is the administratrix of the estate of Job Ryder. The parties being before the Court, the plaintiff gave notice under the 65th rule (Rules and Orders, 1862) that he intended to proceed by petition, and that the question to be raised for the decision of the Court was, that unless the defendant can satisfy the Court that Job Ryder survived his wife, the deceased in the cause, William Allport Peppercorne, one of the next of kin of the deceased, is entitled to administer to her effects. The plaintiff sub-

(1) 2 D. F. & J. 566; 30 L. J. (Ch.) 268.

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sequently, on the 21st of November, 1873, brought in his petition, in which he set out the above facts, and further, that Job Ryder was entitled to considerable property in the event of his surviving his wife, of which he was well aware. That on the 5th of June, 1865, when he called upon her, she was on her death bed, and he knew it, and contemplated succeeding to the property. That he was a person of dissipated habits of life, and had been frequently heard to threaten that he would commit suicide. He prayed that administration should be granted to him on the ground that the deceased had died leaving him, the plaintiff, one of her next of kin. On the 27th of November, 1873, the defendant, on summons, applied for further time to answer the petition, which was granted. Subsequently she took out another summons, calling upon the plaintiff to shew cause why the petition filed by him should not be taken off the files, and why the plaintiff should not deliver a declaration within eight days. This summons was adjourned into court.

Dec. 9. *Bayford* moved accordingly. By the 64th rule (Rules and Orders, 1862) only a question arising in a cause not being one of interest, domicile, or one usually raised by declaration and plea can be brought before the Court by petition: that is to say, only collateral questions or applications to the discretion of the Court. The questions raised in this petition are the material points in issue, and they are well suited to be tried by a jury, and cannot be fairly raised on petition.

Dr. Tristram, for the plaintiff. This application is too late; the defendant, having applied and obtained time to answer the petition, cannot now object to the form of the proceedings. As it has been decided that in such a case as this the onus lies upon the defendant to shew that Job Ryder survived his wife, a petition and answer seems to be a convenient form under which she should do so: *In re Phene's Trusts.* (1)

Cur. adv. vult.

Dec. 16. SIR J. HANNEN. This was a summons adjourned into court, and the question was, whether proceedings which had been commenced by petition should be continued in that form.

(1) Law Rep. 5 Ch. 139.

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There seems to be some doubt as to the exact cases in which a petition is the proper mode of procedure. I am bound to say that I do not think that the matter at issue in the present case will be best heard on petition; but it is a mere matter of procedure, the only difference in the result of proceeding by petition or declaration and plea being, that in one case the matter must be heard before me, in the other it may be decided by a jury. However, in this case the defendant, having asked for time to answer the petition, has waived her right to object to the form of the procedure. Her application, therefore, is too late. As regards the fear expressed by Mr. Bayford that some advantage would be obtained by his opponent, I do not think it is well founded; the onus of proof cannot be transferred from one party to the other by the mere form of procedure. The summons is dismissed with costs.

Attorney for plaintiff: *S. D. Ashby.*
Attorney for defendant: *S. R. Mayo.*

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Jan. 20.

IN THE GOODS OF ROBERT MORANT.

Will—Renunciation of Executor—Retractation—20 & 21 *Vict. c.* 77, *s.* 79.

A testator having died insolvent, the executor of his will signed a renunciation of his right to probate, and such renunciation, together with the other papers to lead a grant to a creditor, were taken into the registry. A difficulty having arisen as to such grant, the papers were withdrawn, and an application made by the executor for probate:—

Held, that a party may retract a renunciation at any time before it is filed and recorded in the registry.

ROBERT MORANT, of New Bond Street, Middlesex, died on the 18th of July, 1873. He executed a will, dated the 16th of April, 1868, in which he appointed Helen Maria Eliza Morant, his wife, Malcolm Stodart, and Frank Cox, executors, residuary legatees in trust, and guardians of his infant children, his wife residuary legatee for life, and his children, who, being a son or sons, should attain the age of twenty-one years, or die under that age, leaving lawful issue, or who, being a daughter or daughters, should attain the age of twenty-one years, or marry under that age, residuary legatees substituted, and his sisters, Edith Rosa Stodart and Anne

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Elizabeth Constance Morant, and his brothers, William Morant and Ernest Alexander Morant, residuary legatees, substituted contingently upon none of his issue attaining a vested interest in his residuary estate. The deceased died insolvent, and it was considered advisable that a creditor should administer the estate; and accordingly Mrs. Morant and Messrs. Stodart and Cox, as executors, as also as residuary legatees in trust, and guardians of the residuary legatees substituted, and Mrs. Morant as residuary legatee for life, renounced probate and administration with the will annexed. Papers were then prepared to lead a grant to William Stewart Forster, as a creditor of the deceased, and these papers, together with the renunciation of Mrs. Morant and Messrs. Stodart and Cox, were left in the registry. The registrar, however, required that, before a grant should issue to Mr. Forster, the contingent residuary legatees substituted should also execute a renunciation of administration with the will annexed of the goods of the deceased. One of these, however, had been last heard of in India, and his address was unknown, and as it was essential that the estate should be administered without delay, it was thought desirable that the relict of the deceased should take probate as one of the executors instead of a grant being made to a creditor. The papers which had been taken into the registry were withdrawn, and the usual affidavits to an executor were prepared; but the registrar objected that, as the relict had executed a renunciation, by 20 & 21 Vict. c. 77, s. 79, her rights as executor had wholly ceased.

C. A. Middleton moved the Court to order probate to issue to Mrs. Morant. No renunciation is complete until it has been entered and recorded in the proper court, and therefore the rights of the person who has executed it in respect of the executorship will not cease until that has been done. [He referred to Williams's Executors, 5th ed., p. 247; Wentworth on Executors, p. 87; *Long* v. *Symes* (1).]

SIR J. HANNEN. I decide this matter in your favour. A renunciation does not exist as an effective instrument until it has

(1) 3 Hagg. Eccl. 771.

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been recorded. Whether it can afterwards be retracted is another question. I hold that a renunciation, until it is filed, is not final, and may be withdrawn. The purpose for which it was executed in this case can be more conveniently carried out in another way, and I order probate to issue to Mrs. Morant as one of the executors of deceased's will.

Proctors: *Shephard & Skipwith.*

IN THE GOODS OF PETCHELL.

Feb. 10.

Will—Two Instruments called respectively "Last Will and Testament"—No Residuary Bequest in last.

2 PD. 102
105-7

The deceased executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and she appointed her executrix. She subsequently executed another instrument, which purported to be her last will and testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, and made her whole and sole executrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue:—

Held, that the two instruments ought to be admitted to probate as together containing the will of the deceased.

ELIZABETH PETCHELL, of Billinghay, Lincolnshire, widow, deceased, on the 5th of June, 1869, executed a will to the following effect:—"The last will and testament of, &c. I give the following legacies: To my nieces, Mary Slack, of the city of Lincoln, widow, and Elizabeth Lane, the sum of 10*l.* each; to my nephew, William Dunster, or Dempster, the son of my late sister, Mary Dunster, or Dempster, 10*l.*; to my great-nephew, R. Claypole, of Rockington, in the county of Lincoln, baker, 10*l.*; and to each of my great-nephews, William Eyre and Robert Eyre, now residing in America, the sons of William Eyre, of Rockington, miller, nineteen guineas; and I give to each of my trustees hereinafter named, who shall act in the trusts of this my will, a sum of 10*l.* as an acknowledgment for the trouble he will have in such trusts. I devise and bequeath all the residue of my real and personal property to my friends, John Rimes, of Billinghay aforesaid, grocer and draper, and John Bowling, of Billinghay aforesaid, farmer, their heirs, executors, administrators, and assigns, upon trust that the said John Rimes and John Bowling, or the survivor of

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them, or the executor or administrator respectively of such survivor, shall and do sell and convert the same into money, and as to my real estate, either together or in parcels, either by public auction or private contract, and with full power to buy in and rescind any contract for sale, &c.; and shall, by and out of the moneys to arise from such sale and conversion, and of the moneys of which I shall be possessed at my death, pay my funeral and testamentary expenses and debts, and the legacies bequeathed by this my will or any codicil hereto; and do and shall pay the residue thereof to my daughter, Ann Walker, the wife of George Walker, of Digby, in the county of Lincoln, wheelwright, for her own absolute use and benefit. And I appoint the said Ann Walker sole executrix of and residuary legatee under this my will, and I revoke all former wills by me made." On the 18th of August, 1869, the deceased executed a codicil by which she confirmed her will, except as altered by the codicil. On the 13th of November, 1871, the deceased executed a testamentary paper to the following effect:—"This is the last will and testament of me, &c. After all my just debts and funeral expenses shall have been paid, I give and bequeath of all my worldly property in the following manner: First, I give and bequeath to my daughter, Ann Walker, the wife of, &c., all my personal and real property, furniture, and all other effects, together with all my estates, of whatsoever kind and wheresoever situated, to be hers during her natural life; and after her decease I give the sum of 300*l.* to be paid out of the aforesaid estates to the children of Ann and Robert Clifton, veterinary surgeon, of Tattershall, in the said county, to be equally divided amongst them, and to be put out to use for them until they are of age, to educate them and to be for their benefit alone. I also give unto William and Robert Eyre, sons of the late William Eyre, miller, the sum of nineteen guineas each; and I give to my niece, Elizabeth Oliver, of Belton, in the isle of Axholm, the sum of 10*l.*; to Mary Slack, 10*l.* I also appoint two trustees, viz., John Rimes, draper and grocer, and Mr. J. D. Bowling, both of Billinghay, in the said county; and I give unto each of them the sum of 10*l.* I also constitute and appoint my said daughter, Ann Walker, the sole and whole executrix of this my last will and testament." This document contained no revocatory nor residuary clause.

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Dec. 16, 1873. *Searle* moved for probate of the will of the 5th of June, 1869, and the codicil dated the 18th of August, 1869, and of the testamentary paper dated the 13th of November, 1871, as together containing the will of the deceased. The deceased intended, in executing the last paper, merely to postpone the payment of the legacies until after her daughter's death, without interfering with the ultimate disposition of her property contained in her first will. [He referred to *In the Goods of Graham* (1); *Geaves* v. *Price* (2); *Lemage* v. *Goodban* (3); *In the Goods of Fenwick.* (4)]

Cur. adv. vult.

Feb. 10. SIR J. HANNEN. In this case the deceased made a will, dated the 5th of June, 1869, by which, after giving various legacies of small amount to some relatives, she appointed two persons as trustees, upon trust to pay her funeral and testamentary expenses and debts, and the legacies bequeathed in her will or any codicil thereto, and the residue of her estate to her daughter Ann Walker for her own absolute use and benefit; and she constituted her daughter sole executrix of and residuary legatee under her will. She afterwards executed a codicil, to which there is no need to refer further. On the 13th of November, 1871, she executed a paper which purported to be her last will and testament. By it she directs that, after all her just debts and funeral expenses have been paid, her property shall be disposed of in the following manner: She gives to her daughter Ann Walker all her real and personal property, furniture, and other effects, together with all her estate of whatever kind, and wheresoever situated, to be hers during her natural life. She then gives some of the legacies she had inserted in the earlier will to the same persons, but payable on the decease of her daughter, and she adds other legacies to a considerable amount on the same terms. The will concludes in these words: "I also constitute and appoint my said daughter Ann Walker the sole and whole executrix of this my last will and testament." It appears then that, by this later instrument, the residue, at the expiration of the life interest and after the payment

(1) 3 Sw. & Tr. 69; 32 L. J. (P. M. & A.) 113.
(2) 3 Sw. & Tr. 71; 32 L. J. (P. M. & A.) 113.
(3) Law Rep. 1 P. & M. 57.
(4) Law Rep. 1 P. & M. 319.

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of the legacies, remains undisposed of. The application to me was, that I should grant probate of these instruments, as together containing the will of the deceased. Where there are two instruments, the later of which in date, purporting to be the last will, does not contain words of absolute revocation, it is a question of construction whether or not it revokes the former. Of course if it be wholly inconsistent with the earlier will there is no difficulty, but where some of the provisions of the former may be made to stand with those of the latter questions of difficulty arise. On this matter there has been a difference in the tendency of opinion amongst the civilians and other jurists who have had to consider it. I must say that if I could have dealt with the question uninfluenced by the later decisions, I should have been disposed to adopt the views of Sir H. J. Fust in *Plenty* v. *West* (1), that in order that two wills should be entitled to be admitted to probate there must be something in the second indicating an intention on the part of the testator that the two instruments should be construed conjointly. But the later decisions are otherwise, and the principle of them must be taken to be correctly expressed in Williams' Exors. 7th ed. 162. "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent." The law thus laid down was acted upon by my predecessor, Lord Penzance, in *Lemage* v. *Goodban*. (2) In that case there were two instruments, both purporting to be the last will and testament of the deceased. In each will there was a residuary clause, but in the latter it was perfectly unintelligible, and it was impossible to give effect to it. The Court held it was justified in granting probate of both instruments, be-

(1) 1 Robert. Eccl. 264. (2) Law Rep. 1 P. & M. 57.

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cause the earlier contained a residuary clause which it was thought it was not the intention of the testator to revoke. That precedent I am entitled to act upon in this case. The effect of the change in the distribution of the property in the second will is, that whereas in the first some small legacies had been ordered to be paid out of the estate in the first instance, and the corpus of the property given to the daughter absolutely, in the later will legacies to a considerable amount were given, and the testatrix, probably having regard to that, ordered that they should not be paid in the first instance, but only on the death of her daughter; and in the meantime she gave her daughter the whole benefit of the fund to be afterwards distributed in legacies. This seems to have been her main object, and she does not in express terms revoke the residuary clause in favour of her daughter contained in the first will. Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest which is found in the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper. The two instruments, together with the codicil to the first, will be admitted to probate, as together containing the will of the deceased.

Attorneys: *Taylor, Hoare, Taylor, & Cooke.*

In the Goods of LOWRY.

Feb 10.

Will—Executor according to the Tenor—Trustee.

The deceased, in her will, appointed E. H. her sole trustee, and directed that he should be paid as an attorney the same as if he had not been a trustee. The only duties assigned to him were those of a trustee:—

Held, that he was not an executor according to the tenor of the will.

Eliza Lowry, of Durran Hill House, Carlisle, spinster, died on the 10th of December, 1873, having executed a will dated the 5th of February, 1873. This will was so far incomplete that the spaces for the names of the persons to whom she intended to leave

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her furniture and linen were in blank, and the residue was undisposed of. The important paragraphs were the following: To Eliza Ker Lawrie and her sister Johanna Jane Deborah Lawrie I give the interest of 4000*l.* three per cent. consols for their joint lives, and to the survivor for her life. If no issue, then the whole 4000*l.* to be paid to the Reverend John Lowry Carrick, son of the late Mrs. Warwick. . . . To Miss Jane Johnstone 20*l.* a year for life, to be paid quarterly, out of my Botcherley estate, free from all expenses or duty whatever. I appoint Mr. Edwin Hough my sole trustee, and he is to be paid as an attorney the same as if he were not a trustee to this my last will and testament.

January 13. *Bayford* moved the Court to grant probate to Mr. Hough as the executor, according to the tenor of the will. He is to be paid as an attorney, and he must have duties to perform: there are none given to him as trustee, and therefore it may be presumed that the deceased intended that he should pay her debts and legacies, which are the duties of an executor. The case *In the Goods of Punchard* (1) differs from this, inasmuch as there the deceased himself declared he had no debts to be paid.

Cur. adv. vult.

Feb. 10. SIR J. HANNEN. The question in this case was whether a particular person was entitled to probate as executor according to the tenor of the deceased's will. Mr. Hough's name is mentioned in the following manner: "I appoint Mr. Edwin Hough my sole trustee, and he is to be paid as an attorney the same as if he were not a trustee to this my last will and testament." Now the question is whether, in that passage, he is constituted an executor within the tenor of the will. In other words, whether the duties of an executor are thereby intended to be assigned to this gentleman. I think there is nothing in the words to indicate that it is intended to give him the power and assign him the duties of an executor. There is one passage in the will which plainly shews that the duties he is to perform are those of a trustee: "To Eliza Ker Lawrie and her sister Johanna Jane Deborah Lawrie I give the interest of 4000*l.* three per cent. consols for

(1) Law Rep. 2 P. & M. 369.

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IN THE GOODS OF LOWRY.

their joint lives, and to the survivor for her life. If no issue, then the whole 4000*l.* to be paid to the Reverend John Lowry Carrick, son of the late Mrs. Warwick." The duties thus created are those of a trustee. The principle acted upon in this matter is that, unless it can be gathered from the terms of the will that the testator intended that the person named should pay the debts and legacies under the will, he cannot be held to be executor: *In the Goods of Punchard.* (1) In this case there is nothing to shew that Mr. Hough is to discharge the duties of an executor: he is a mere trustee, and I must refuse the application.

Attorneys: *Sharp & Ullithorne.*

IN THE GOODS OF WOTTON.

Feb. 10.

Will—Execution—Position of Signature—15 *Vict. c.* 24.

The deceased having obtained a form of will, lithographed on the first side of a sheet of foolscap paper, wrote her will on the second and third sides thereof, terminating near the bottom of the third side; the fourth side was blank. The form was not filled up except as to the appointment of executors. The deceased signed her name, in the presence of witnesses, at the foot of the lithographed form:—

Held, that, as regards the position of the signature, the execution was valid as within the provisions of 15 Vict. c. 24.

ELIZABETH WOTTON, of the Friendly Female Asylum, Gloucester Place, Camberwell, spinster, deceased, on the 26th of December, 1866, made and executed a will in the following manner: She obtained a lithographed form in which the property was to be given to two or more persons absolutely, and executors were to be appointed. It contained also testimonium and attestation clauses. This lithographed matter was on the first side of a sheet of foolscap paper. On the second and third blank sides of this sheet the deceased wrote her will, beginning on the top of the second side:—"This is the last will and testament of Elizabeth Wotton, inmate of the Friendly Female Asylum, Gloucester Place, Albany Road, Camberwell, spinster, I bequeath, &c." The will terminated about two inches above the end of the third side. The fourth side was blank, except a lithographed indorsement stating the nature

(1) Law Rep. 2 P. & M. 369.

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of the document. The lithographed form was not filled up save as to the appointment of executors, as follows. "*I nominate, constitute, and appoint* Mr. William Bartlett, tailor, Water Lane, and Mr. Joseph William Holden, confectioner, Brixton, 53, Church Street, Shoreditch, to be *execut of this my will.*" (The words in italics were lithographed, the rest written.) The deceased signed her name at the end of the testimonium clause on this, the first, page, and the witnesses, Emma Bloomfield and Matilda Ann Henley, attested her signature on the same side. It appeared from the affidavits that the deceased, when she executed the will, was spending Christmas at the house of her former master, and that the witnesses were servants in the house. The words on the second and third sides of the paper were wholly written before the will was executed, and the deceased intended to commence her will on the second side, and considered the printed form as the conclusion thereof.

Jan. 13. *Inderwick* moved for probate of the will. If the Court will accept the second side of the paper as the first page of the will there will be no difficulty in concluding that the first side of the paper is the termination of the will. It is immaterial that the fourth side is blank. [He referred to *Hunt* v. *Hunt.* (1)]

Cur. adv. vult.

Feb. 10. SIR J. HANNEN. In this case the testatrix, having made use of a printed, or rather lithographed, form of will, which was on the first side of a foolscap sheet of paper, executed it at the foot of that side, and her signature was attested by the witnesses on the same side. Her will, however, was written and entirely contained on the second and third sides of the same foolscap paper. It commenced on the top of the second side in the ordinary form, "This is the last will and testament of Elizabeth Wotton, inmate of the Friendly Female Asylum, Gloucester Place, Albany Road, Camberwell, spinster. I bequeath, &c.," and was continued nearly to the end of the third side. The fourth side is substantially blank, as it contains only the ordinary lithographed indorsement. The appointment of executors was inserted in the proper place in the lithographed form, and the will was, as I have said, executed

(1) Law Rep. 1 P. & M. 209.

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by the signature of the testatrix at the bottom of the form, which was duly attested. The question is, whether the document is entitled to be admitted to probate as being properly executed within the language of the Wills Acts. Now nothing can be more general than the language used in the statute 15 Vict. c. 24, which was passed to cure the miscarriages which had occurred under the previous Act. I will call attention to the words of the statute: "No will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding words of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature." And then follow words which express what is commonly called the spirit of the Act. "No signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made." Now, of course, if in this case the whole will were to be treated as following the attestation clause, the application must fail. This is the point, therefore, upon which the whole case turns. Substantially the whole will is written on the second and third sides of the sheet of foolscap; the attestation is on what, under ordinary circumstances, would be called the first side. Must I hold that the dispositive part of the will follows the signature of the deceased and the attestation? I think I am not so bound, because it appears from the affidavit of the attesting witnesses that the whole document was written before the execution by the testatrix, and if so, the true way to look at the transac-

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tion seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and second pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed. The fact that the fourth side of the paper is in blank is immaterial. I hold that the will was duly executed.

Proctor: *Goldsmith.*

Feb. 17.

IN THE GOODS OF OSWALD.

Will—Words introduced per incuriam—Omission.

The deceased by her will left a portion of her furniture and household effects to her daughter, and disposed of the residue of her property, appointing trustees and executors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will and testament, and in addition to a clause to the effect above mentioned, contained one revocatory of all former wills. This paper was executed by the deceased, but was not read over to or by her, and she was not aware that it contained such words of revocation:—

Held, that, as the words of revocation had been introduced per incuriam and without the instructions of the deceased, and their presence there was unknown to the deceased when she executed the will, they ought to be omitted from the probate.

MARTHA OSWALD, of Beccles, Suffolk, widow, deceased, died on the 21st of March, 1873, having made a will with two codicils thereto, dated respectively the 3rd of March, 1859, and the 3rd of March, 1865, and one codicil without date. By the will she appointed James Read the younger and Henry James Kerrison executors and trustees. She gave to her daughters, Georgina Emily Crisp and Sarah Read, to and for their uses absolutely, all her household goods, and furniture, plate, china, wearing apparel, and consumable stores, and the residue to her two sons, Robert William Oswald and William Oswald, and the two daughters above-mentioned, equally, for their uses absolutely. On the 7th of December, 1872, she executed another testamentary paper to the following effect:—"This is the last will and testament of me,

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Martha Oswald, of Beccles, in the county of Suffolk, widow, whereof I appoint James Read the younger, of Mildenhall, Suffolk, gentleman, and Henry James Kerrison, of Beccles, aforesaid, gentleman, executors. I give and bequeath all my furniture, plate, linen, china, books, and all other household effects now belonging to me, unto Georgina Emily Crisp, the wife of James Crisp, of Beccles, aforesaid, coal merchant, for her own separate use and benefit, free from all control, debts, or interference of her said husband, the said James Crisp. I hereby revoke all former wills by me heretofore made. In witness," &c. It appeared from the affidavit of Mr. Kerrison that in December, 1872, he saw and had a conversation with the deceased upon the subject of her will and the manner in which her household furniture was to be disposed of. James Crisp, the son-in-law of the deceased, to whose wife a portion of such furniture was bequeathed by her will, was in pecuniary difficulties, and he therefore suggested to Mrs. Oswald that she should secure the furniture for the sole and separate use of her daughter, free from the control, debts, or interference of her husband. The deceased assented, and instructed him (Mr. Kerrison) to have a document, carrying out the suggestion, prepared. Mr. Fiske was requested to draw up the proper instrument for the purpose, and prepared the will dated the 7th of December, 1872, which was sent to Mr. Kerrison, who, accompanied by his wife and Georgina Cowles, the two attesting witnesses, attended upon the deceased, when it was duly executed by Mrs. Oswald. The paper was never read over by or to the deceased before she executed it, and she was not aware of the clause of revocation contained therein. No instructions were given to Mr. Fiske to insert such a clause, and it never was the intention of the testatrix to revoke the dispositions made by her of her property, except so far as to secure the bequests made to her daughter. The whole property of the deceased was in value under 200*l.* All the next of kin and the parties entitled in distribution in case the deceased had died intestate consented to probate being granted as asked for by this motion.

G. H. Cooper applied to the Court to decree probate of the will dated the 3rd of March, 1859, and of the two codicils thereto,

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as also of the paper dated the 7th of December, 1872, as together containing the will of the deceased, excluding from the last the clause of revocation. He referred to *In the goods of Duane.* (1)

SIR J. HANNEN. It was clearly not the intention of the deceased to revoke her previous will. From the facts stated in the affidavit it is evident that the words of revocation were introduced into the last paper per incuriam, and therefore probate will issue without them.

Attorney: *A. Scott Lawson.*

March 17.

IN THE GOODS OF DILKES.

Will—Signature—Foot or End—Attestation.

Prob 1867-B

The will of the deceased was written on a lithographed form, and extended over the first and second sides of a sheet of foolscap paper. The form contained attestation clauses at the foot of the first and second sides of the paper. The deceased made a mark in the blank spaces left for the purpose in both such clauses. Two witnesses signed their names at the bottom of the first side only, and before the deceased made her mark in the attestation clause of the second side :—

Held, that the only mark which could give validity to the will was on the second side, and that was not attested by the witnesses.

REBECCA DILKES, of Leicester, widow, died on the 8th of May, 1873, without issue, leaving John Benson, her natural and lawful father, surviving her. She had executed a will bearing date the day of her death, in which she appointed William Tacey executor. The will was written on the two first sides of a sheet of paper, and was as follows, the words in italics being lithographed :—" *This is the last will and testament of me,* Rebecca Dilkes, widow, of Geo. Street, Belgrave Gate, Leicester, *in the county of* Leicester, *made this* eighth *day of* May, *in the year of our Lord one thousand eight hundred and* seventy-three. I *hereby revoke all wills by me at any time heretofore made. I appoint* William Tacey, 94, Lyston Street, Leicester, *to be my executor, and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease. I give and bequeath unto* my brother, John Ben-

(1) 2 Sw. & Tr. 590; 31 L. J. (P. M. & A.) 173. 8 Jur. N.S. 752

son, now of Leicester." The remainder of the first side contained specific legacies to her immediate relatives. At the foot of this first side was a lithographed attestation clause :—

"*Signed by the said* Rebecca Dilkes (her × mark), *the testator, as and for her last will and testament, in the presence of us, &c.*

"Nathaniel Preston,
200, Belgrave Gate.
"William Smith,
209, Belgrave Gate."

At the top of the second side were the lithographed words, "*The will continued,*" and then followed other specific legacies in writing, which occupied the greater portion of the second side. At the bottom of this side was a second lithographed attestation clause, with the deceased's name and mark inserted in the blank left for the purpose, but the witnesses did not sign their names on that side. There was no residuary clause in the will. From the affidavit of Nathaniel Preston, one of the attesting witnesses, it appeared that the whole will was written and read over to the deceased before she made her marks in the two attestation clauses, but that the witnesses had signed their names before the deceased made her mark on the second side.

Searle moved for administration with the will annexed to be granted to Mr. Benson, the deceased's father; the executor named in the will having renounced probate thereof. There is a class of cases in which a signature duly attested has been held a good execution to render valid what preceded, but not what followed it. So, in this case, the Court may decree probate of the legacies on the first side of the sheet of paper, above the mark of the deceased, which was attested, and omit those on the second side: *Keating* v. *Brooks* (1); *In the Goods of Davies.* (2)

[SIR J. HANNEN. In each of those cases there was only one signature of the deceased, and, from all that appeared, the testator intended it should be the signature to his will. The question in this case is with what intention the deceased made her mark on the first side of the paper?]

In the case of *Sweetland* v. *Sweetland* (3) the deceased had

(1) 4 No. of Ca. 261. (2) 3 Curt. 748.
(3) 4 Sw. & Tr. 6; 34 L. J. (P. M. & A.) 42.

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signed his name at the end of the several sheets of his will except the last, and the Court refused to grant probate of the sheets he had signed, as the signature was not at the end of the will.

SIR J. HANNEN. I am of opinion that this case is governed by the decision in *Sweetland* v. *Sweetland*. (1) If the holograph part of this document be taken as the will, there is no attested signature at the foot or end of it. The signature on the first page was made merely to authenticate what was written thereon, and it was intended to execute the will by the subsequent signature; but such intention was not formally carried out. The mark at the end was made as an execution of the will, but then it was not attested by the witnesses. I must reject the application. (2)

Attorneys: *Williamson, Hill, & Co.*

June 9.

PHIPPS AND BIDDELL *v.* HALE AND OTHERS.

Will—Attestation—Witnesses' Signatures not on the last Sheet.

The deceased signed his name at the end of his will, on the tenth sheet, and placed his initials on the first nine sheets. Two out of three witnesses signed their names on the first nine sheets, but not on the tenth:—

Held, that the operative signature of the deceased was not duly attested, and the execution was incomplete.

THE plaintiffs, as executors, propounded a paper bearing date 14th day of January, 1873, as the last will and testament of Joseph Eaton Hale, of Somerton, in the county of Suffolk, gentleman, who died on the 16th day of February, 1874. The defendants pleaded that the paper so propounded was not duly executed according to the provisions of the statute 1 Vict. c. 26, in manner and form as alleged. The will was written on ten foolscap sheets of paper numbered. At the foot of the first nine sheets were the initials of the deceased, J. E. H., and the words, Witness, Jno. Cambridge, William Braddock Fisher, and Robert Adams. At the bottom of the will, on the tenth sheet, was the name of the deceased, Joseph Eaton Hale, written in full, and opposite the attestation clause, Jno. Cambridge only. Mr. Cambridge deposed that he is a solicitor, and prepared the will in question for the deceased. It

(1) 4 Sw. & Tr. 6; 34 L. J. (P. M. & A.) 42. (2) See next case.

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was written on ten sheets of paper opening brief-wise, which sheets were fastened together with ribbon, the knot of the ribbon being sealed. On the day of the execution the deceased signed, in the presence of the witnesses, his initials on the first nine sheets, and, at Mr. Cambridge's particular request, his name in full at the end of the will. Mr. Cambridge then signed his name on each of the ten sheets, and handed the will to the other witnesses with the direction to place their names under his, which they did on every sheet except the last. After the execution the will was left with the deceased, and remained in his custody until his death. The two witnesses could give no explanation why they did not sign the tenth sheet.

May 22. *Dr. Deane, Q.C.*, and *Searle*, for the plaintiffs. If there had been only one signature of the witnesses the execution would have been clearly sufficient. Can the repetition nine times of it make that a bad execution which would have been good if the witnesses had only signed once? The fact that the third witness has signed at the foot or end cannot affect the question.

[SIR J. HANNEN. If the witnesses intended to do more than identify each sheet, why did they write their names nine times?]

The signing eight times after the first signature was surplusage. They were over careful. If they had signed at the bottom of the ninth sheet only, supposing that to be the foot or end of the will, the attestation would have been good. If so, their signatures on the preceding eight sheets cannot make it bad.

[SIR J. HANNEN. I cannot help feeling that the witnesses did not do that which the legislature intended that they should do for the purpose of attestation.]

Dr. Spinks, Q.C., and *Pritchard*, appeared for the defendants. [The cases cited were *Roberts* v. *Phillips* (1); *Ewen* v. *Franklin* (2); *In the Goods of Chamney*. (3)]

Cur. adv. vult.

June 9. SIR J. HANNEN. In this case the will of the deceased was written on ten sheets of paper. The deceased signed the will on the tenth sheet in the presence of three witnesses, having previously placed his initials on the other nine. One of the wit-

(1) 4 E. & B. 450. (2) Deane, 7. (3) 1 Rob. 757; 7 N. of C. 70.

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nesses attested the signature by writing his name to the attestation clause; he also wrote his name in the margin of each of the preceding nine sheets opposite the initials of the testator. The other witnesses wrote their names on the nine first sheets opposite the initials of the testator, but did not write anything on the tenth sheet. The question for consideration is whether this was a good attestation. It has been held in several cases that the signatures of the witnesses need not be in any particular part of the will, but that they will suffice wherever placed if intended to attest the operative signature of the testator: *In the Goods of Davis* (1); *In the Goods of Chamney* (2); *Roberts* v. *Phillips*. (3) But in the case of *Ewen* v. *Franklin* (4), where a will was signed by the testator and the witnesses in the margin of the first four sheets, but the testator alone signed the fifth, it was held that the attestation was insufficient, Sir J. Dodson thinking that the signature on the earlier sheets was intended only to prevent the interpolation of other sheets, and that there was nothing from which it could be inferred that the signatures on the four sheets were intended to attest the signature of the testator to the whole will. That case is not distinguishable from the present. There is nothing from which I can fairly draw the inference that the witnesses intended by their signatures to do more than attest the initials of the testator, against which their signatures were placed. That the witnesses thought they had signed all the sheets does not seem to me to carry the case any further. The fact that the witnesses, if they had observed that there were ten sheets, would have subscribed the tenth does not alter the intention with which they signed the previous nine, and I think that the only intention which can be naturally ascribed to such signing is that they intended to attest the initials of the testator on each sheet to which they affixed their signatures. I hold, though with regret, that the will was not duly attested, and I accordingly refuse probate of it. (5)

Attorneys for plaintiffs: *Walter Moojen & Son.*
Attorney for defendants: *Thomas Horwood.*

(1) 3 Curt. 748.
(2) 1 Rob. 757.
(3) 4 E. & B. 450.
(4) Deane, 7.
(5) See *In the Goods of Dilkes*, ante, p. 164.

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Will—Execution—Witness's Name partly written—"Attest and subscribe." *May 5.*

The deceased executed her will in the presence of two witnesses, one of whom signed his name thereto; but the other, after writing his Christian name, was unable, through feebleness, to complete his signature. Subsequently a third person was introduced, and the deceased made her mark in the presence of such person and the witness who had signed his name. The latter traced his signature over with a dry pen, and the former signed his name:—

Held, that the execution was invalid in the latter case by reason that the witnesses did not both attest and subscribe the signature of the deceased; and in the former by reason that one witness had no intention, by writing his Christian name only, to subscribe the will.

ELIZABETH MADDOCK, late of Castle Northwick, Cheshire, widow, deceased, on the 16th of June, 1861, executed her will by making a mark at the foot thereof in the presence of Joseph Clare and Samuel Birtwistle. Joseph Clare thereupon attested and subscribed the same as witness by signing his name, and Samuel Birtwistle attempted to do so also, but after making the letters or marks appearing on the will under the name of Joseph Clare—that is to say, the word "Saml."—he, being old and infirm, found he could not complete his signature legibly, and desisted. Joseph Clare then struck through with a pen the word "Saml." so written, as of no effect, and sent for Joseph Birtwistle, the son of Samuel Birtwistle. On his arrival the will was again read over to the deceased, who thereupon made her mark with a pen and ink over her former mark, in the presence of Joseph Clare and Joseph Birtwistle. Joseph Clare traced over his original signature with a dry pen and Joseph Birtwistle signed his name to the will as witness.

April 21. *Bayford* moved the Court to decree probate of the will to the executors, John Clough and William Sumner, named therein. The last attempt at execution was invalid, because the deceased's signature was not attested by two witnesses; but the first signature was so attested, for Birtwistle wrote the word "Saml." with an intention to attest and subscribe the will; and it is sufficient for a witness to make a mark or write a portion of his own name, or

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even another person's, to satisfy the requirements of the statute as to subscription: *Charlton* v. *Hindmarsh*. (1)

SIR J. HANNEN. The question is whether, by writing what he did, he had a completed intention to attest the will. I will look into the cases.

Cur. adv. vult.

May 5. SIR J. HANNEN. This was a question as to the execution of a will. The deceased signed her will in the presence of two witnesses, one of whom attested her signature by subscribing his name; the other commenced to write, but being an old man and having a difficulty in doing so, after having got as far as "Saml.," his Christian name, he could get no further, and thereupon the other witness struck out the word "Saml.", and sent for another person. This person having come in, the deceased made a mark with a pen over her former mark; and the first witness, instead of re-writing his name, used a dry pen to his signature. Such a subscription has been held to be insufficient: *Casement* v. *Fulton* (2); *Playne* v. *Scriven*. (3) This second attempt at execution having failed, the question arises whether the Court can treat the writing of the letters "Saml." by the witness as a sufficient subscription on his part. I take it as a rule that if a witness makes any mark with an intention thereby to subscribe the will, it will be sufficient. The very imperfect signatures of witnesses and testators to be found in wills are illustrations of this rule. But the statute requires that a party shall intend, by what he does, to subscribe, and in this case I think the witness has failed to do what was necessary. In *Hindmarsh* v. *Charlton* (4) the deceased having signed his name in the presence of one witness, who attested the same, afterwards acknowledged his signature in the presence of that witness and another. The first witness on such acknowledgment merely crossed the first letter of his Christian name (Frederick) and added a date. He gave his reason for doing so as follows: "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the

(1) 1 Sw. & Tr. 433. 5 Jur. N.S. 501
(2) 5 Moo. P. C. 130.
(3) 1 Rob. 772.
(4) 8 H. L. C. 160. 7 Jur. N.S. 6

omission. This was done merely in pursuance of my habit; I thought it better to do so. I thought adding the date was equal to a repetition of the signature; I think I had no other intention. It was by the date I intended to repeat my signature. My sole object in crossing the 'F' was to supply the omission to make the name complete; I thought it necessary to have the name complete." In that case the execution was held to be insufficient. In giving judgment the Lord Chancellor (Lord Campbell) said: "Now, then, the question in this case is, whether that which took place was a subscription of the witness, whose subscription is in question, or not. I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was intended to represent the name." Lord Cranworth concurred with the Lord Chancellor on this point, and Lord Chelmsford made the following remarks: "Upon witnessing the will in the forenoon of the day of execution Mr. Wilson subscribed his name, intending that it should be a complete signature. It was insufficient as a complete subscription under the Act, because only one witness was present; and the sole question is whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription. Mr. Wilson certainly intended to subscribe as a witness in the afternoon, but he thought that adding the date was equivalent to a repetition of the signature. . . . The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription? If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname, which he had added in the afternoon, that would have been a subscription which would have satisfied the requisition of the Act, for there would really have been only one complete subscription; but the omission of the cross to the 'F' in his Christian name did not make the signature imperfect, for Mr. Wilson states he very often omitted to put the cross at all, and he did not add the cross to complete his signature so as virtually to subscribe anew, but merely in pursu-

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ance of his habit of supplying the omission when he noticed it." I have come to the conclusion that I must reject this application, being of opinion that the witness did not put the word "Saml." on the paper with the intention at the time that it should be a perfect subscription to the will. Having done something, he broke off without completing the intention. In the case of *In the Goods of Sperling* (1) the witness did not sign his name, but merely the words "Servant to Mr. Sperling;" and the Court thought the attestation sufficient, by reason that the witness wrote them intending thereby an identification of himself as the person attesting. The act in this case is not sufficient to shew such an intention, so as to amount to a subscription to the will.

Proctor: *Ayrton.*

May 5.

INGLESANT *v.* INGLESANT.

Will—Execution—Acknowledgment of Signature.

Post 248
3 Sw & Tr 507

The deceased signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. The will was lying on the table open, and headed in large characters with the words, "This is the last will and testament of," &c. It also had a full and formal attestation clause:—

Held, that the deceased acknowledged her signature in the presence of two witnesses.

MARY ANN INGLESANT, as executrix, propounded the will of Ann Inglesant, of Quorndon, in the county of Leicester, widow, deceased, bearing date the 1st of December, 1872. The defendant, William Harris Inglesant, the son of the deceased, pleaded undue execution, incapacity, undue influence of the plaintiff and of Mrs. Lee, and that the deceased, at the time of the execution of the will, did not know and approve of the contents; and upon these pleas issue was joined. The case was heard before Sir J. Hannen without a jury. As regards the question of execution, the evidence given was to the effect that the will was executed by the deceased,

(1) 3 Sw. & Tr. 273.

a very old lady, aged about ninety years, in the house of Mrs. Lee. That Mrs. Lee, on the suggestion of the deceased, fetched as witnesses John Greaves and his wife Ann Greaves, who lived next door, and had witnessed her signature previously. According to Mrs. Lee's statement, they both returned with her to the room where the deceased was sitting with the will open before her; that the deceased thereupon signed her name in their presence, and then Mrs. Lee said to John Greaves, "Sign your name under Mrs. Inglesant's signature;" that he did so, and then his wife signed, and they left the house. John Greaves's statement was that he did not know the paper was a will; that he did not accompany Mrs. Lee to the house, but got there some time after when the deceased had signed; that he noticed the deceased's signature on the will when he signed it. On cross-examination he answered, "I never heard a word what the paper was. Mrs. Lee asked me to sign. She said, 'Now, Mr. Greaves, you must put your name here' (pointing to a place under the deceased's signature). Mrs. Inglesant had signed before I arrived. It was in the parlour. Mrs. Inglesant sat in a chair. I spoke to her. She seemed confused. I asked her how she did. She made no answer. My wife signed after me. I signed first. My wife waited until I came in. I was ten minutes in the room. My wife had been there an hour. I was half an hour after her. I was smoking a pipe. When Mrs. Lee asked us to go in, I said, 'Mother, you had better go in; I will finish my pipe and then follow you.' It was half-past one in the afternoon. When I got into Mrs. Lee's parlour my wife was sitting at the table, talking to Mrs. Lee. I heard no more of the matter until after the old lady was dead." On re-examination he said, "They called it a paper. I thought it might be a will, but it might have been a deed of gift. I have said I saw the large letters at the top of the will." Ann Greaves deposed, "I went into Mrs. Lee's house. Mrs. Inglesant was sitting at the table. A paper was on the table, with pen and ink. Mrs. Lee said to Mrs. Inglesant, 'You must sign your name there' (pointing to the place). The deceased did so, but I do not recollect she said anything. My husband was not there at that time. He was smoking his pipe. Afterwards he came in. Mrs. Lee met him at the door. She told him to write his name. We both

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wrote our names in Mrs. Inglesant's presence. I was ten minutes there before my husband." The will was very short—written on the first side of a sheet of foolscap. It commenced with the words, "This is the last will and testament of me, Ann Inglesant," in large letters, and had a full attestation clause.

April 25. *Dr. Spinks, Q.C.* (*Dr. Middleton* with him), for the plaintiff. If Mrs. Lee is to be believed the deceased signed her name in the presence of two witnesses. She is a disinterested witness, and there is no reason why the Court should accept evidence against the act of execution.

[SIR J. HANNEN. Both the attesting witnesses agree they were not in the room together when the deceased signed her name, and the husband gives a reason, namely, that he was smoking his pipe. I am not satisfied that they were both present when the signature was made.]

In all the cases in which the question arose whether there was a sufficient acknowledgment, it depended upon whether the name of the testator was on the will at the time the witnesses signed, or whether they saw it. In this case the signature was made in the presence of Mrs. Greaves, and her husband admits he saw it. Mrs. Lee having asked the Greaves to sign the paper in the presence of the testatrix, it was a tacit acknowledgment on her part of her signature.

Dr. Deane, Q.C. (*Searle* with him). There was no acknowledgment in this case, for the deceased said and did nothing. In all the reported cases the testator did some act or said some word during the proceedings.

[The cases referred to were *White* v. *Trustees of the British Museum* (1); *In the Goods of W. Philpot* (2); *In the Goods of I. Thompson* (3); *Faulds* v. *Jackson* (4); *In the Goods of J. Summers* (5); *In the Goods of M. Davies* (6); *Ilott* v. *Genge* (7); *Lloyd & Hart* v. *Roberts* (8); *Gwillim* v. *Gwillim* (9); *In the Goods*

(1) 6 Bing. 310.
(2) 3 No. of Ca. 2.
(3) 4 No. of Ca. 643.
(4) 6 No. of Ca. suppl. 12.
(5) 2 Rob. 295.
(6) 2 Rob. 337.
(7) 4 Moo. P. C. 271.
(8) 12 Moo. P. C. 166.
(9) 3 Sw. & Tr. 200.

of Huckvale (1); *Beckett* v. *Howe* (2); *Pearson* v. *Pearson and Pearson* (3); *Morritt* v. *Douglas.* (4)]

Cur. adv. vult.

May 5. SIR J. HANNEN. In this case I took time to consider the question whether the testatrix acknowledged her signature in the presence of the two attesting witnesses. The other points in issue I disposed of at the hearing. Was the acknowledgment sufficient? The peculiarity of the case is that the two attesting witnesses agree in this, that the signature of the deceased was put to the will before one of them came into the room. Both agree that Mrs. Lee, in the presence of the testatrix, upon the second witness coming into the room, requested him to put his name under the name of the testatrix. Both also agree that the testatrix did not say anything or do any act in reference to the will after the two witnesses were there, and consequently the question turns upon this, whether the words used by Mrs. Lee can be taken to be the words of the testatrix. The authorities abound which shew that if the words used by Mrs. Lee had been spoken by testatrix, namely, an invitation to the witnesses to put their names under the signature of the testatrix, that would have been an acknowledgment sufficient to render the execution valid. Therefore the question is, whether the invitation given by Mrs. Lee in the presence of the testatrix was equivalent to an invitation by, and therefore an act of, Mrs. Inglesant herself. All the cases mentioned, with one exception, are subject to this observation—in each some word or act of the testator himself was used. But this does not apply to *Faulds* v. *Jackson.* (5) There the testator, having signed his will, shewed it to his clerk, and then sent him to fetch a second witness. When the latter came into the room the first witness said, "William, Mr. Jackson wants you to sign this paper." Whilst the second witness was in the room the testator had his left arm lengthway over the paper, which entirely covered the paper, and he never spoke to any one. The arguments on one side and the other shew that the point now before me was presented for the decision of the judges. Mr. Heathcote says, "In all the cases which have been decided, either upon the new law or the

(1) Law Rep. 1 P. & M. 375.
(2) Law Rep. 2 P. & M. 1.
(3) Law Rep. 2 P. & M. 451.
(4) Law Rep. 3 P. & M. 1.
(5) 6 No. of Ca. suppl. 12.

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old, there has been an acknowledgment in words, or something which, although not in words an acknowledgment, does in fact amount to the same thing as if the testator himself handed the paper to the witness and requested him to sign it, which has been considered an acknowledgment. It is going much further to say that another person asking the witness to sign amounts to an acknowledgment." Again, Mr. Loftus Wigram said, "I submit it is sufficient if before the attestation the witnesses had seen the signature of the testator, and if in the presence of both of them he does or sanctions any act which imports a recognition of his signature; and the strongest act of recognition that can be done by a testator is to call upon a party, or sanction a party's being called upon, to attest. . . . If I call my clerk into a room and sign my name in his presence, and he at my request calls another person in, who sees my signature, and they sign their names as witnesses, I standing by, that is an acknowledgment in the presence of both. This is according to the common understanding of mankind." And Dr. Addams, in reply, observed, "I do not dispute that an acknowledgment in fact is as good as an acknowledgment in terms; and supposing Rowley had been called into the room, and Caukwell, acting at the desire and as the agent of the deceased, had said, 'Mr. Jackson wishes you to sign this paper,' and the signature had been openly there—I do not mean to say, although the deceased did not utter a word, that that would not have been a sufficient acknowledgment." I call attention to these observations to shew that the exact question now before me was also before the Court in that case. Lord Brougham said: "Their Lordships therefore consider it is quite clear that Rowley was called upon to witness the signature, and that this was an acknowledgment to Rowley by the testator that this was his signature. This is still further proved, because it is sworn by Caukwell that he (Caukwell) said to Rowley (in all probability in the hearing of the testator), 'It is Mr. Jackson's signature, or Mr. Jackson's instrument, you are to witness.'" The exact question now before me was before the Court on that occasion. That case, therefore, is, as nearly as can be, parallel with the present, and the only question is, is there evidence which leads me to conclude that the words used by Mrs. Lee were heard by Mrs. Inglesant? If so, the case applies. As the evidence stands, I must adopt the view that the word

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were heard by the testatrix. Mrs. Greaves had just before been conversing with her, and no question has been put to any witness to raise a doubt that the testatrix did hear the words used by Mrs. Lee. Moreover, the execution was undoubtedly in furtherance of the wishes expressed by the testatrix when she sent for the witnesses. I have come to the conclusion that I must accept the words used by Mrs. Lee as the words of the testatrix; and if so, I must pronounce for the will. The costs of both parties will be paid out of the estate, except such costs as may be applicable exclusively to the pleas other than that of imperfect execution which have been filed by the defendant.

Attorneys for plaintiff: *Deane & Lickorish.*
Attorneys for defendant: *Williamson, Hill, & Co.*

IN THE GOODS OF JOHN BOOTLE. *May 5.*

Will—Realty only—Order to pay Debts—Legacies out of Proceeds of Sale—Jurisdiction.

By his will the deceased ordered his debts to be paid and a portion of his real estate to be sold, and out of the proceeds thereof certain legacies to be paid. All his other tenements or hereditaments whatsoever, in remainder or expectancy, he gave and devised unto his son and daughters in equal proportion. No direct reference was made therein to personal estate:—

Held, that the Court of Probate has no jurisdiction to grant probate of such a will.

JOHN BOOTLE, of the parish of Ashton, Lancashire, beerseller, died on the 13th of March, 1860, having executed his will, bearing date the 9th day of April, 1857. The material parts of such will were as follows: "I order and direct all my just debts to be paid; and whereas, relative to the dwelling-house, messuage, and premises on which I now reside, situate in the parish aforesaid, in the county aforesaid, with the appurtenances, together with my messuage or dwelling-house, with the appurtenances, situate in the township of Luish, in the parish of Sefton, that they be, with all convenient speed after my decease, sold either by public auction or private contract, at the discretion of my trustees hereinafter mentioned. I give and bequeath the net proceeds of my above said heredita-

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ments unto Thomas Mather, of Ashton, surgeon, and Henry Wood, of Ashton, farmer, their heirs, executors, and administrators, upon the trusts following, that is to say: upon trust that they, my said trustees, divide and give to my daughter Margaret Bootle, my son Robert Bootle, my daughter Elizabeth Bootle, my daughter Sarah Bootle, and my daughter Alice Bootle, equal shares from the said proceeds of the sale thereof. And as to all other tenements or hereditaments whatsoever, in remainder or expectancy, with their appurtenances, I give and devise the same to my said son and daughters in equal proportion; and I hereby further declare that the trustee and trustees for the time being of this my will shall be charged and chargeable only with such moneys as they respectively shall actually receive, &c. And it shall be lawful for the said trustees, by and out of the moneys which shall come to their or his hands, to retain or allot to each other all costs, expenses, or charges which they shall respectively sustain or expend in the execution of this my will. Provided, nevertheless, the sum of one hundred pounds be reserved to my said trustees from and out of the said proceeds of the sale of my aforesaid property, to be given to my sister Margaret Jameson, with power to her to receive the said sum, after the said sale, for her own use and benefit absolutely." The personal estate of the deceased amounted in value to the sum of 193*l.*, and the debts to 206*l.* 17*s.* 10*d.*, and funeral expenses to 5*l.* 19*s.* 11*d.*

April 21. *Moorsom* moved the Court to decree administration with this will annexed to Robert Bootle, one of the next of kin of the deceased, with the consent of all other parties interested. He distinguished this case from those in which the Court had refused to grant probate of a will which related to realty only, inasmuch as in neither of those was there any direction to pay debts, any trust for sale, or gift of legacies out of the proceeds. [He referred to *Elliot* v. *Merryman* (1), *Field* v. *Peckett* (2), *Thorold* v. *Thorold* (3), *O'Dwyer* v. *Geare and Another* (4), *In the Goods of H. Drummond* (5), *In the Goods of J. Barden.* (6)]

Cur. adv. vult.

(1) 1 Wh. & T. L. C. Eq. 85.
(2) 29 Beav. 568.
(3) 1 Phillim. 1.
(4) 1 Sw. & Tr. 465.
(5) 2 Sw. & Tr. 11.
(6) Law Rep. 1 P. & M. 325.

May 5. Sir J. Hannen. This was an application to admit to probate a will relating wholly to real property. The principle has been well established that this Court has no jurisdiction in such a case, and I must reject the application. In the case *In the Goods of Drummond* (1) Sir Cresswell Cresswell held that it was contrary to the practice of the Court to make such a grant.

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Attorneys: *Norris, Allen, & Carter.*

BEALE *v.* BEALE (otherwise JONES) and Others.

May 5.

Testamentary Suit—Rule 41 (*Rules and Orders*, 1862)—*Notice—Condemnation in Costs.*

Under special circumstances the Court will condemn a next of kin in costs of suit, notwithstanding he may have, under rule 41 (Rules and Orders, 1862), given notice with his pleas that he merely insisted on the will being proved in solemn form, and that he intended only to cross-examine the witnesses produced in support of the will.

In this case a will of Mr. Beale, bearing date the 17th of August, 1849, was propounded by the defendant as executor therein named. The plaintiff pleaded that it was not executed in accordance with the statute 1 Vict. c. 26, and that the deceased was not of sound mind at the time such will bore date. With his pleas he filed a notice, under rule 41 (Rules and Orders, 1862), that he merely insisted on the will being proved in solemn form of law, and that he only intended to cross-examine the witnesses produced in support of the will at the hearing.

April 16. *Dr. Spinks, Q.C.*, and *Inderwick, Q.C.*, appeared for the defendant.

Pritchard, for the plaintiff.

Cur. adv. vult.

May 5. Sir J. Hannen. The deceased person, whose will it was sought to prove, died on the 23rd of February, 1866, the will bearing date the 17th of August, 1849. Probate was called in by the next of kin, who was a near relation of the deceased, and had been in his employment up to the time of his death. He

(1) 2 Sw. & Tr. 11.

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remained after the death in the employment of his son, who was appointed executor in the deceased's will, and who immediately after the death took probate in common form. About two years later the next of kin had some dispute with his employer, the testator's son, and claimed to be the master, probably having in his mind a fact which was not known until after the testator's death, namely, that the testator had not been lawfully married, and that his son was illegitimate, although the mother had always been treated as the deceased's wife. The next of kin, setting up this claim to be master, was dismissed. Some proceedings also became necessary against his wife, and she was bound over to keep the peace. In this state of things, the next of kin, having done nothing since the will was proved in common form, took these proceedings to call in the probate. It further appeared that one of the attesting witnesses was dead and the other in Canada, so that it was seen that proving the will in solemn form would be attended with expense and difficulty. The next of kin had sought to protect himself from costs by giving notice under rule 41, and the only question for my consideration is whether he ought to be condemned in costs, notwithstanding such notice. I was told such condemnation would not be in accordance with the practice; but I have found two cases, *Evans* v. *Knight & Moore* (1) and *Green* v. *Proctor & Newey* (2) (see also *Urquhart & Waterman* v. *Fricker* (3)), in which Sir J. Nicholl expressed his clear opinion that the Court has power to condemn the next of kin in full costs. It would be impossible to have stronger facts than these I have stated to justify the condemnation of a next of kin in costs. He abstained from calling in probate for several years, although he had a perfect knowledge of all the facts which were brought to light in the investigation before me, and he only called it in at last out of spite and for the purpose of annoying the executor by exposing a fact which, of course, the family were desirous of keeping secret. I therefore condemn the next of kin in costs.

Attorney for plaintiff: *W. Bristow.*
Attorneys for defendants: *Fry & Hudson.*

(1) 1 Add. Eccl. 229. (2) 1 Hagg. Eccl. 337. (3) 3 Add. Eccl. 57.

ANDREW AND BARRETT *v.* BROOKE AND McVEAGH AND OTHERS CITED. 1874 *June* 2.

Testamentary Suit—Examination of Witness de bene esse—Insufficient Grounds.

In order to found an application for the immediate examination of a witness in a pending suit, the affidavit must set out special circumstances; it is not sufficient that it states that the witness is a material witness.

THIS was a suit instituted to try the validity of the will of Miss Mary Brooke, deceased. The issues were tried before Sir J. Hannen and a special jury, in July, 1873, and a verdict given in favour of the will propounded by the defendant Elizabeth Brooke. A rule nisi for a new trial was afterwards granted, which stood over for argument before a full Court.

May 26. Application was made for the examination of Mrs. Frances Paynter, on the following affidavit of Edward Moberley:—"I am a solicitor and a member of the firm of Messrs. Tyler, Wickham, & Moberley, the solicitor for Elizabeth Brooke, one of the defendants in the cause. I have had the conduct of the cause. One of the material questions raised at the trial of the issues in this cause, related to certain statements stated by the said defendant to have been made in conversation by Miss Mary Brooke, deceased, in the cause, in reference to the destruction at Strasburg, of a will of her sister, Sarah Brooke, deceased. Since the hearing of the said cause I have received information that Frances Paynter, of 13, Grosvenor Place, in the city of Bath, wife of Admiral Paynter, and who was a friend of the deceased in this cause and of other members of the family, was present when a conversation took place at the house of the defendant, between the defendant and the said Mary Brooke in reference to the said will, and I am advised by counsel that the evidence of the said Mrs. Frances Paynter on the subject of the said conversation, is material to the issues in this cause, and that it is of importance that it should be perpetuated in the event of the prolonged litigation in reference to the validity of the will propounded in this cause, and the defendant is anxious that the evidence of Mrs. Paynter should be forthwith taken under an order of this Court to guard against its being lost in the event of future litigation."

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Dr. Tristram, moved accordingly. He depended upon the practice of the Court of Chancery in perpetuating testimony and the case of *Brown* v. *Brown*. (1)

Inderwick, Q.C., for the plaintiffs.

Cur. adv. vult.

June 2. SIR J. HANNEN. This was an application to allow a witness to be examined by a commissioner. It was not based on any statement that the witness is ill, or infirm, or of great age, but I was asked to allow the examination to take place on the same principles that the Court of Chancery allows an examination of a person for the purpose of perpetuating his testimony. The case of *Brown* v. *Brown* (2), was relied upon as an authority for such an application. In that case Lord Penzance did allow a commission to issue to examine a surviving attesting witness, although the affidavit did not disclose any ground except that the witness was sixty-six years of age. Lord Penzance made an observation in which I quite concur. "The Court of Chancery, however, has always been ready to step in and extend the powers exercised by the common law Courts, on a separate application being made to it, and would do so in this case. I think it is a great evil that a suitor should be sent from court to court, and should depend upon the assistance of another Court to obtain the relief which he ought to have in the court in which his suit has been instituted. It seems that the Court of Chancery has been in the habit in suits to perpetuate testimony, of taking the examination of an important witness, if there is danger of the testimony being lost by reason of death. I see no difference whether the witness be sixty or seventy years of age, or whether there is only one witness who can speak to a particular point. The real substantial matters for consideration are, whether the testimony offered will be pertinent to the point at issue, and whether it is of such value that if lost by the common and ordinary accidents of life the party in whose favour it would have been given would be seriously injured." It is clear, however, that Lord Penzance based his judgment upon what he considered to be the practice of the Court of Chancery: it being a case, it may be observed, in which the sole fact was that the witness was

(1) Law Rep. 1 P. & M. 720. (2) 1 Law Rep. 1 P. & M. 720.

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sixty-six years of age. I have examined the practice of the Court of Chancery, and have sought such assistance as I could obtain, and I have come to the conclusion that there are no grounds made in this case on which the Court of Chancery would act. The practice as to perpetuating testimony is applicable only for the purpose of obtaining evidence to be used in a future suit; it does not allow of the perpetuating the testimony of a witness in an existing suit, because there will be the opportunity of examining such a witness in the ordinary course. So far does the practice of the Court of Chancery differ from that alleged, that if the statement made before me had formed matter for a bill in the Court of Chancery, such bill would have been demurrable. As in the present case the litigation is still pending, I much regret the application. If, perchance, another trial be granted, there is no reason why the witness should not be examined. It is a point of great value to have the testimony given by the witness in the first instance in open Court.

Attorneys for plaintiffs: *Pain & Hammond.*

Attorneys for defendant Elizabeth Brooke: *Tyler, Wickham, & Moberley.*

IN THE GOODS OF SARAH SAYER EUSTACE.

July 7.

Married Woman's Will—Made under a Power given to her by her Settlement—A subsequent Will referring to such Power, and containing general revocatory Words—Revocation.

The testatrix, a married woman, executed a will, in which, referring to a power to that effect given to her under her marriage settlement, she disposed of all her property in favour of her husband. She subsequently made a second will, in which she referred to the same power, and bequeathed the greater portion of the property affected by the settlement to certain persons. This will contained words revoking all former wills made by the testatrix:—

Held, that the first will was revoked thereby.

SARAH SAYER EUSTACE, of Exmouth, Devonshire, the wife of Thomas Marston Eustace, surgeon, died on the 3rd day of February, 1869. By an indenture of settlement made on her marriage with Mr. Eustace, a freehold messuage at Heavitree, near Exeter, being No. 11, Salutary Mount, the property of the deceased, and

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all moneys belonging to her were settled on Mr. Eustace for life, and then on the deceased, if she survived him, absolutely; but if she should die before him, the property was, subject to her husband's life interest, to go to such person or persons as she should by her will appoint, and in default of appointment the freehold was to go to her heir at law, and the personalty to her next of kin, to the exclusion of her husband. Her household goods and other effects were also settled so as to be at her separate disposal during her life, and if any remained after her death, the same were to go to such person as she should appoint by her will, and in default of appointment, to her next of kin, excluding her husband. On the 24th of October, 1859, the deceased executed a will to the following effect: "Whereas I am entitled under my marriage settlement for my separate use for life to certain real and personal property therein mentioned and described with a power of appointment over the same after my death, I hereby appoint, devise, and bequeath all the real and personal estate and property of whatever nature or description which I may die possessed of, or over which I may have the power of disposal, to my husband, Thomas Marston Eustace, absolutely." On the 22nd of June, 1863, the deceased executed another will to the following effect: "This is the last will and testament of me, Sarah Sayer Eustace, wife of Thomas Marston Eustace. Whereas by my marriage settlement I have power to dispose of my house, No. 11, Salutary Mount, Heavitree, and of certain moneys, which were moneys settled by the said settlement. Now I do hereby give, devise, and bequeath the said house, No. 11, Salutary Mount, Heavitree, with its rights, members, and appurtenances, to my dear cousin, Richard Eales, of the city of Exeter, solicitor, his heirs and assigns for ever. I also give and bequeath to the said Richard Eales the sum of 1000*l.* in trust to pay the interest thereof to Mrs. Trood for her life, and after her death the principal to all her children equally, share and share alike." The deceased then gave other legacies, and concluded: "I appoint Mr. Richard William Spicer, of Chard, in the county of Somerset, and the said Richard Eales, executors of this my will, and revoke all former wills by me heretofore made."

June 16. *Inderwick, Q.C.*, moved the Court to order probate to

issue of both these documents as together containing the will of the deceased. The deceased had property of three kinds, of which she had power to dispose, a freehold house, certain moneys, and household furniture. She disposes of all these in the first will, but in the later will she omits the household furniture. General revocatory words in a will will not revoke a previous will made in execution of a power unless a clear intention to do so is apparent in the language of the second will. The intention of the deceased in this case will be best carried out by admitting both documents to probate. He referred to *Hughes* v. *Turner* (1); *In the Goods of Meredith* (2); *In the Goods of Merritt* (3); *In the Goods of Joys* (4); Jarman, Wills, 3 ed. p. 159.

Cur. adv. vult.

July 7. SIR J. HANNEN. The deceased in this cause, a married woman, died in February, 1869, having under a power contained in her marriage settlement made a will, dated the 24th of October, 1859, whereby she appointed all the real and personal estate over which she had any power of appointment to her husband. On the 22nd of July, 1863, the deceased made another will, by which, after reciting the power under her marriage settlement, she devised a freehold house included in the settlement to her cousin, Richard Eales, and bequeathed certain specific legacies amounting to 2800*l.*, and appointed the said Richard Eales and another, since deceased, her executors. This will contained the following clause:—"I revoke all former wills by me heretofore made." Application was made on behalf of the husband for an order decreeing probate of both instruments as together containing the last will of the testatrix. It was contended, in support of the application, that the revocatory words of the latter instrument did not per se revoke the prior will, and that the fact that the will of 1869 left undisposed of a portion of the property included in the settlement (in particular the household furniture) negatived an intention to revoke the will of 1859. The case of *In the Goods of Merritt* (3) was relied on as an authority for this contention. In that case, however, the later will containing the general revocatory clause related solely

(1) 4 Hagg. Eccl. 30.
(2) 29 L. J. (P. M. & A.) 155.
(3) 1 Sw. & Tr. 112.
(4) 30 L. J. (P. M. & A.) 169.

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to the property to which the power under which the previous will was made was not applicable, and no reference was made to that power or to the property thereby appointed. In these circumstances Sir C. Cresswell held that the revocatory clause did not operate to revoke the earlier will. A like distinction from the present case will be found to exist in all the cases in which general words of revocation have been held insufficient to manifest an intention to revoke a will made in execution of a power. Thus in *In the Goods of Joys* (1), and in *In the Goods of Meredith* (2), the later will contained no reference to the power under which the earlier will had been made, or to the property included in it; but in the case of *Richardson and Lang* v. *Barry* (3) it was held that the earlier will made in execution of a power was revoked by a subsequent one directly referring to the deed conferring the power and containing an express revocatory clause. In this case there is a direct reference in the will of 1863 to the power under the marriage settlement, and the inference to be drawn from this reference is that the testatrix intended the language of the whole instrument of 1863, including the revocatory clause, to be applicable to the will of 1859 made under the power recited. I therefore decree probate of the will of 1863 alone.

Proctors: *Toller & Son.*

Nov. 12.*

POWELL *v.* POWELL AND JONES.

Alimony pendente Lite—Allowance under Separation Deed.

When a husband and wife at the time of the institution of a matrimonial suit are living apart under a deed of separation by which an allowance is secured to the wife, the mere fact of the institution of the suit does not entitle the wife to an increased allowance by way of alimony pendente lite estimated on the husband's present income.

THIS was an appeal to the full Court from a decision of the Judge Ordinary, refusing to make an allotment of alimony pendente lite to a wife in proportion to the husband's present income, the wife

(1) 30 L. J. (P. M. & A.) 169. (2) 29 L. J. (P. M. & A.) 155.
(3) 3 Hagg. Eccl. 249.

* Before the Judge Ordinary, Grove, J., and Pollock, B.

having been living apart from the husband, under a deed of separation, for many years before the suit was instituted, and being in receipt of an allowance secured by the deed. For the facts of the case and the judgment of the Judge Ordinary, see Law Rep. 2 P. & M. 55.

Dr. Spinks, Q.C., and *Dr. Swabey*, for the respondent, in support of the appeal. The amount of alimony to be allotted in any case is within the discretion of the Court; but it is a judicial, not an arbitrary discretion, and must be exercised in accordance with the rules laid down in the decided cases. The great increase which has taken place in the husband's income since 1862, when the deed of separation was executed, must be taken into consideration; and although the 40*l.* a year secured to the wife by the deed must not be left out of the calculation, it can only be treated as the amount of the wife's separate income. If alimony had been allotted by the Court at the rate of 40*l.* a year, the wife would have been entitled to an increase on shewing an increase in the husband's faculties. On the same principle the allowance which she agreed to accept when his income was smaller, ought to be increased in proportion to his present income. The institution of the suit by the husband alters their relationship to each other, and re-opens the question of allowance, and she is now entitled to the usual proportion of alimony. It is a mistake to treat the question of alimony as one of bare maintenance for the wife; she is entitled to more than a bare maintenance, to a sufficient maintenance in proportion to the husband's means.

Ballantine, Serjt., and *Bayford*, for the petitioner. The wife has been satisfied with the income which she has for many years been receiving under the deed. The institution of the suit makes no alteration in her circumstances, and it would be a strange anomaly if, because she is charged with adultery, she is entitled to a larger income than she before received. The receipt of an allowance under a deed is not an absolute bar to an allotment of alimony, but it may fairly be taken into consideration when the Court is called on to exercise its discretion as to the amount to be allotted. [The following cases were cited: *Miles* v. *Chilton* (1); *Hakewill* v.

(1) 1 Roberts, 684; 6 N. C. 636.

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Hakewill (1); *Kelly* v. *Kelly* (2); *Williams* v. *Williams* (3); *Williams* v. *Baily* (4); *Webber* v. *Webber and Pyne* (5); *George* v. *George*. (6)]

GROVE, J. When listening to Dr. Spinks' argument, my impression primâ facie was rather in favour of the wife, but with the reservation, that I expected it would be shewn that some change had been effected in her status by the accusation of adultery now brought against her; as, for instance, that she had been put to greater expense than before by a necessary change of residence. Some such increase of expense, in consequence of the suit, would not be improbable, and the question occurred to me, upon whom the onus of proving such an increase would rest. Assuming that the reason for granting alimony pendente lite upon an application by the husband for a divorce, is grounded upon the circumstance that the wife has, up to that time, been living with and supported by the husband, and that when she is obliged to live separate from him by reason of his application, it becomes necessary that provision should be made for her maintenance, the Court, in making an allotment, would follow the general rule observed in previous cases, not as a matter of law, but as a matter of practice. It would be influenced by the fact that, instead of living with her husband and enjoying his property as before the institution of the suit, she would be obliged to live separate from him, and it would consider that she ought to have an allowance suitable to her condition until she should be proved to be guilty. In such cases no proof of a change of status on the part of the wife is required, because it is obvious such a change must follow from the necessity of living separate from the husband, and while so living separate she must require some allowance for her maintenance. But where there has been a previous separation, and a sum has been allotted to the wife for her separate maintenance at the time of the separation, and she has lived separate from the husband upon that sum, it does not follow that her position has been altered by the institution of a

(1) 30 L. J. (P. & M.) 254.
(2) 32 L. J. (P. & M.) 181.
(3) Law Rep. 1 P. & M. 178, 370.
(4) Law Rep. 2 Eq. 731.
(5) 1 Sw. & Tr. 219; 28 L. J. (P. & M.) 11.
(6) Law Rep. 1 P. & M. 553.

suit against her. The onus, therefore, in such a case lies upon the wife if she seeks for increased alimony to shew that her status has been changed. If any grounds had been put forward to shew such a change, I think they would have been well worthy of the consideration of the Court, and, if supported by evidence, would probably have induced the Court to make a grant of alimony. But no grounds have been put forward in the present case. All that has been said is that a petition has been presented by the husband for the dissolution of the marriage. But what difference does that make in the respondent's status? Is it worse than before the accusation was made? We are to presume that she is innocent, although an accusation has been made against her; but that does not of itself alter her status, and the burden, therefore, of proving that there has been a change rests upon her. With regard to the cases cited by Dr. Spinks, one of them, *Williams* v. *Williams* (1), goes no farther than saying that the Court will not consider a wife estopped by her covenant not to seek for a further allowance than that provided by the deed of separation from petitioning for increased alimony. A similar remark applies to *Williams* v. *Baily* (2), which was an interlocutory proceeding in Chancery. In *Weber* v. *Weber and Pyne* (3), all that was decided was that the alimony pendente lite might be taken at the rate provided for in the deed of separation. Those cases establish the proposition, in which I agree, that a deed of separation is not necessarily a bar to an increased allowance of alimony; but they go no further than that. They do not shew that the wife is entitled to an increase of alimony as soon as a suit is instituted, notwithstanding the deed of separation, without some grounds being shewn why such increase should be made. It is alleged that since the execution of the deed of separation the husband has come into the possession of large property. Whether that would be a ground for an application to the Court of Chancery it is not necessary to discuss. The ground of the application here is not the change of the husband's circumstances, but the fact that he has presented a petition for dissolution of marriage. But the wife has not been obliged, by the presentation of that petition, to live

(1) Law Rep. 1 P. & M. 178, 376.
(2) Law Rep. 2 Eq. 731.
(3) 1 Sw. & Tr. 219; 28 L. J. (P. & M.) 11.

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separate from her husband or to increase her expenditure; and I can therefore see no reason for granting an increase of alimony. The case of *George* v. *George* (1) appears to me to be a decision quite applicable to the facts before us. I see no difference substantially between that case and the present, and it is a strong authority for the decision of the Judge Ordinary. We have been asked to consider whether the Court exercised a judicial discretion in arriving at its judgment. It is a nice and difficult question how far a Court of Appeal can interfere with the judicial discretion of the tribunal whose judgment is the subject of appeal. I have sometimes had to consider the subject, and I think that, in order to entitle a Court of Appeal to interfere with the decision of the original tribunal, its discretion must be shewn to have been exercised not judicially—that is, either that it was not exercised impartially, or that the result itself was so obviously erroneous as to lead to the conclusion that some material circumstance was not brought to the notice of the Court. There must be something in the decision which, from its extravagance, shews that there was some mistake, or what may be called a miscarriage of justice. The discretion of a Court must be exercised, not arbitrarily, but fairly and judicially, and a Court of Appeal should not interfere with the judicial discretion of a judge, merely because in a particular case it might in its own discretion have come to a different conclusion. I do not say what decision I should have come to in this case, had I been bound to exercise my discretion. I have to decide whether the Judge Ordinary was wrong in acting on the decision in *George* v. *George* (1)—that is, in holding that the onus of shewing a change of status lies upon the person claiming alimony. I cannot say he was wrong in so holding, nor that his judicial discretion was improperly exercised.

POLLOCK, B. In my opinion there is no ground for disturbing the order of the Judge Ordinary. If I were to be asked on what ground this Court—sitting as a court of appeal—ought to exercise what is properly called judicial discretion, I should answer that in this Court above all others it is highly desirable that the practice

(1) Law Rep. 1 P. & M. 553.

should be uniform and consistent, both for the convenience of the suitors and the upholding of sound principle. And if the learned judge had departed from the ancient well-known practice of the Court, or had established a limitation on facts which did not fairly give rise to that limitation, it would be matter for grave consideration whether we ought not to interfere. But it is not suggested that the old rules of the Court have been disturbed; and the only question raised before us is whether the learned Judge, applying his mind to the facts of this case, ought to have increased the wife's allowance, not upon the ground of any real change of circumstances, but simply because the husband has thought fit to file a petition in this Court charging her with adultery. Now, so far back as 1862 a separation was agreed upon between the parties, and a deed was executed, under which an allowance of 40*l.* a year was secured to the wife. It is clear that a court of equity could give effect to that agreement. It might have been open to the wife to endeavour to disturb it by alleging fraud or undue concealment of facts, or possibly by shewing a change of circumstances not contemplated by the parties when they entered into the agreement. No such thing was shewn, and, on the contrary, it was shewn that until this petition was presented the amount of 40*l.* a year was paid to and received by her. But that is not all. I should be inclined to think that, if facts existed to induce a court of equity to entertain the proposition that the amount specified in the deed should be increased, it would be also open to this Court, when called on to exercise its discretion, to go into the question; and beyond that, I should say it would be open to and proper for the Judge-Ordinary, if he found that anything arising from the filing of the petition had affected the position of the wife, and went to shew that her alimony ought to be increased, to take all those facts into his consideration. She might have been residing abroad, or living cheaply in the country, and might require more money to come here and attend to the suit; and if any such circumstances were shewn they should be considered. I say nothing with regard to her costs, because it is obvious that they cannot form an element in our consideration of this matter. The two things—alimony and costs—are distinct. The matter comes then to this—a petition has been filed by the

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husband, and it is suggested that because of that petition the condition of affairs financially should be reconsidered, and the Court should determine what would be a fair and reasonable arrangement for parties who had already made an arrangement for themselves. In my mind it would be extremely dangerous to do so.

THE JUDGE ORDINARY. The argument of the appellant has been, that the rule which prevails in this Court in calculating the alimony, pendente lite, in proportion to the joint income of the husband and wife is an absolute rule, and that the Court has no power to depart from it in the exercise of its judicial discretion. I think that is not so. In considering whether there is any elasticity in the rule it is necessary that we should look at the reason of it. I think the reason has been correctly given by my Brother Grove, that under ordinary circumstances upon the institution of a suit for dissolution of marriage, the wife is deprived of the enjoyment of the joint income which she had, up to that time, possessed. It is, therefore, fair and right,—the object being that while the suit is pending, she should be maintained as nearly as possible in the same position, so far as money can go, in which she was when the suit was instituted,—that she should have a proper allowance for the purpose, and that object is attained by allowing her a certain proportion of the joint income. But that reasoning is not applicable to the present state of facts. The wife, for a number of years, has lived upon an income which I must suppose she deemed to be sufficient, for no attempt appears to have been made to have it increased until the institution of this suit. I carefully guarded myself against laying down any such proposition as that the existence of a deed of separation was a bar to a petition for alimony. I did not think it necessary to state the particular circumstances under which I should make an increase in the allowance provided for by a deed of separation, because sometimes such intimations have the effect of suggesting allegations of the existence of the circumstances indicated. I therefore gave no illustration; but to-day some circumstances have been mentioned, which, if they existed, might have induced me to grant the respondent a larger allowance.

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Dr. Spinks applied for the respondent's costs of appeal.
Bayford, contrà.

THE JUDGE ORDINARY. If an application had been made to me for an order for her costs of appeal, on the ground that she could not prosecute the appeal without such order, I would have considered it, but no such application was made. I therefore concur with my learned Brothers, who consider that, as the appeal has been unsuccessful, we ought not to make any order as to costs. The wife's costs of appeal will therefore not be taxed against the husband.

Appeal dismissed; no order as to costs.

Attorneys for petitioner: *Dobinson & Geare.*
Attorneys for respondent: *Field, Roscoe, & Co.*

SHORT *v.* SHORT AND BOLWELL.

Feb. 10.

Dissolution—Unreasonable Delay—Dismissal of Petition.

A husband discovered his wife in adultery in September, 1859, and separated from her, but did not present a petition for the dissolution of his marriage until July, 1873. He was a coal hauler, and admitted that, at the time when the petition was presented, he had stock-in-trade of the value of about 600*l.* and nine horses, besides some cottages which he had purchased through a building society. The Court refused to accept want of means as a sufficient explanation of the time which he had allowed to elapse before taking proceedings, and dismissed the petition on the ground of unreasonable delay.

THE petitioner, George Short, a coal hauler at Bath, married the respondent, Elizabeth Short, in June, 1843, and lived with her until September, 1859, when he discovered her in the act of adultery with Tom Bolwell, a lodger in his house, and separated from her. She had ever since cohabited with Bolwell, and on the 17th of July, 1873, Short filed a petition for the dissolution of his marriage on the ground of her adultery. The respondent, in her answer, made counter charges of adultery, cruelty, wilful separation, and neglect and misconduct against the petitioner; and further alleged that he had been guilty of unreasonable delay in presenting his petition. The cause came on for hearing before the Judge

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Ordinary on the 31st of January, 1874, when it was adjourned, in consequence of the absence of the respondent and her witnesses, and it came on again on the 10th of February, 1874. The adultery of the respondent and the co-respondent was proved, and some evidence was produced in support of the counter charge of adultery against the petitioner. The counter charge was denied by the petitioner, and some evidence was produced to corroborate his denial; but it became unnecessary to decide whether the counter charge was established, in consequence of the conclusion at which the Court arrived on the question of unreasonable delay. No evidence was produced as to the counter charge of cruelty, wilful separation, and neglect and misconduct.

Upon the question of delay, the petitioner's statement was in substance as follows:—That in September, 1859, he left the respondent in consequence of her adultery, and he had since lived in the same neighbourhood where she and the co-respondent were cohabiting; that, at the time of the separation, he was in the employment of the respondent's father, who was a hauler; and that after the separation her father gave him a cart, with which he started in business on his own account, but he still worked occasionally for her father; that he gradually got on in business; that he now had nine horses, and stock-in-trade of the value of about 600*l.*; that in 1870 he began to subscribe to a building society, and had continued his subscription to the present time; that he had lately obtained an advance from the building society, with which he had purchased two cottages; that he also owned the lease of a small cottage, which he inherited from his mother, who died between two and three years ago; that his present income, from all sources, did not exceed 25*s.* a week; that his wife had contracted debts to the amount of about 50*l.*, which he was obliged to pay after the separation; that he had contributed to the support of his mother until her death, and that he had endeavoured to obtain an advance of money from the building society for the purpose of instituting this suit, but had failed to do so; and that he presented the petition as soon as he could raise sufficient ready money to pay the costs of a suit.

Searle, for the petitioner. The delay is not unreasonable, for,

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at the time of the separation, the petitioner had not the means of presenting a petition, and he was not bound to ruin himself by going into debt for the purpose. He has worked his way up gradually, and he has taken proceedings as soon as he could obtain ready money without making too great a sacrifice. His position in life and education should be taken into consideration. A delay which might be unreasonable in the case of a person of superior position and education, because it would tend to shew acquiescence in the wrong done him, ought not to be regarded as unreasonable in the case of a coal hauler. There is no suggestion and no evidence of anything like acquiescence or carelessness; on the contrary, the petitioner separated from the respondent as soon as he discovered her adultery, and he has since held no communication whatever with her. Unreasonable delay should only be a bar when it tends to shew connivance, or condonation, or a want of sincerity in the suit. Even if the Court should consider the delay to be unreasonable, it is only a discretionary bar; and a decree has been granted, notwithstanding such delay: *Newman* v. *Newman.* (1) [He also referred to *Mortimer* v. *Mortimer* (2) and *Harrison* v. *Harrison.* (3)]

Brickwood, for the respondent.

THE JUDGE ORDINARY: I abstain from giving a decision on the question whether the adultery of the petitioner is established, because I am clearly of opinion that I ought to dismiss the petition on the ground of unnecessary delay. I have often expressed my surprise at finding cases brought into this Court after years of delay, but, making every allowance for the position in life of the petitioner, and the other matters which have been suggested on his behalf, I cannot accept it as a sufficient reason for a delay of fourteen years, that he has not had the means of taking proceedings earlier. His course through life has been one of considerable success, for, beginning as an assistant in the business of his father-in-law, and starting in business for himself with one cart and no horse, he has carried on his business for several years with such success that, at the present time, he has no less than nine

(1) Law Rep. 2 P. & M. 57. (2) 2 Hagg. Cons. at p. 313.
(3) 3 Sw. & Tr. 362.

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horses and a capital invested in his stock-in-trade of about 600*l*. He has also paid subscriptions to a considerable amount to a building society for some years past. He therefore presents to the Court the picture of a man who has been thoroughly prosperous in life. For twelve or fourteen years he has been living in the same town with his wife and her paramour, content to push his business, and the last thing he has thought of is to obtain a divorce. He has only taken proceedings for that purpose after the woman with whom he is alleged to have been living in adultery has died. A change then comes over him in his domestic relations, and he wakes up to the expediency of obtaining a divorce. I come to the conclusion that the petitioner, all the facts being known to him, has been content to see his wife living in adultery with the co-respondent for all these years, and has now, for some other purpose than that of obtaining relief from the tie of matrimony on account of that adultery, instituted these proceedings. I therefore dismiss the petition with the respondent's costs.

Solicitor for petitioner: *J. J. Darley.*
Solicitor for respondent: *T. E. Watkin.*

March 10.

FREDERICK *v.* THE ATTORNEY GENERAL, AND FREDERICK CITED TO SEE PROCEEDINGS.

Legitimacy Declaration—21 & 22 Vict. c. 93—Allegations relating to a Claim to a Baronetcy.

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The Legitimacy Declaration Act gives the Court no jurisdiction to investigate or decide upon a claim to a title of honour, and allegations in a petition, to the effect that by reason of the facts therein set out the petitioner was entitled to a baronetcy, were ordered to be struck out as irrelevant.

THIS was a petition presented under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93, praying for a declaration that the petitioner's grandfather, Charles Frederick, was lawfully married to Martha Rigden on or about the 30th day of March, 1773, and that his father, Edward Frederick, was one of the natural and lawful sons of the said marriage. After alleging the marriage between Charles Frederick and Martha Rigden, the birth of Edward Fre-

derick, the marriage of Edward Frederick to the mother of the petitioner, and the birth of the petitioner, the petition proceeded as follows:—

"5. That your petitioner is a natural born subject of Her Majesty the Queen, and is legally domiciled in England, and is the natural and lawful and eldest son and heir at law of the said Edward Frederick, and as the natural and lawful grandson of the said Charles Frederick, and the natural and lawful son and heir at law of the said Edward Frederick, is a baronet of the United Kingdom of Great Britain and Ireland by the death of his cousin the late Sir Richard Frederick, of Burwood Park, in the county of Surrey, and Berkeley Square, in the county of Middlesex, the sixth baronet, who died on the 21st of September, 1873.

"6. That Charles Frederick, of No. 13, Victoria Street, Westminster, in the county of Middlesex, alleges that he is entitled to succeed to the said baronetcy on the ground that your petitioner's said paternal grandfather was not lawfully married to the said Martha Rigden.

"Wherefore your petitioner humbly prays," &c.

Morgan Howard, for the Attorney General, moved that the petition might be amended by striking out the allegations relating to the petitioner's claim to a baronetcy. The statute gave the Court no jurisdiction to entertain such a claim or to make any order or decree which would affect it.

Searle, for Vice-Admiral Frederick, who had been cited and had filed an answer traversing the alleged marriage between the petitioner's grandfather and Martha Rigden, supported the motion.

Dr. Tristram, for the petitioner. No prayer is founded on the allegations to which the objection is made, and the Attorney General and the other parties cited will not be prejudiced by allowing them to remain.

THE JUDGE ORDINARY. I am of opinion that the allegations in the petition which relate to the claim to the baronetcy are beyond the jurisdiction conferred on this Court by the statute. No doubt they explain the particular reason which has induced the petitioner to institute this suit; but they are not a proper

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subject-matter for investigation by this Court. They are, in fact, as irrelevant as would be an allegation that by reason of the facts set out in the petition, the petitioner was entitled to a certain coat of arms. The allegations objected to must therefore be struck out.

Solicitors for petitioner: *Loughborough & Son.*
Solicitor for Attorney General: *E. L. Rowcliffe.*
Solicitor for Vice-Admiral Frederick: *W. H. Dunster.*

March 14.

BROWN *v.* BROWN AND PAGET, THE QUEEN'S PROCTOR INTERVENING.

*Evidence—Cross-examination as to Adultery—*32 & 33 *Vict. c.* 68.

A party to a cause, who is produced as a witness on his own behalf, and in his examination-in-chief denies the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, is liable to be asked, and is bound to answer, questions in cross-examination respecting all the charges contained in the pleadings.

THIS was a suit by a husband for a dissolution of marriage. After a decree nisi had been pronounced the Queen's Proctor, intervening, filed pleas wherein he charged the petitioner with adultery.

The petitioner traversed the allegations in the pleas, and the cause came on for hearing before the Judge Ordinary by a special jury.

On behalf of the Queen's Proctor, some of the women with whom the adultery was alleged to have been committed, were examined in support of the charge. The petitioner was examined on his own behalf, and denied that he had been guilty of adultery with any of the women who had given evidence, and whose names were mentioned in the Queen's Proctor's pleas and particulars.

Sir J. Karslake, A.G. (*Staveley Hill, Q.C.*, and *Searle*, with him), for the Queen's Proctor, in cross-examination, asked the petitioner whether he had committed adultery with women other than those whose names were mentioned in the pleadings.

Dr. Spinks, Q.C. (*Dr. Tristram* with him), for the petitioner, objected.

Sir J. Karslake referred to the 6th paragraph of the plea: "That in and during the years 1871 and 1872 the petitioner has frequented a public-house called the Mischief, in Oxford Street, and a public-house called the King's Arms, in Hanway Street, and the Oxford Hall, in Oxford Street, and the Royal Music Hall, in Holborn, and that he has on numerous occasions committed adultery with various prostitutes whom he has met in the places aforesaid, and whose names are unknown to the Queen's Proctor, at divers houses in the neighbourhood of the said places." The usual order for particulars had been made, and in pursuance of that order the Queen's Proctor had made an affidavit that from the facts within his knowledge he was unable to give particulars of this allegation. The petitioner having tendered himself as a witness to deny the adultery charged by the Queen's Proctor, is liable to be cross-examined as to this allegation.

Dr. Spinks referred to the proviso in the 3rd section of the Evidence Further Amendment Act, 1869. (1) The petitioner is only liable to cross-examination as to those acts of adultery which he has denied in his examination-in-chief. His denial having been confined to the specific charges with women whose names are mentioned, he is not liable to be asked, or bound to answer, a question respecting a general charge which he has not denied, and in support of which no evidence has been produced.

[THE JUDGE ORDINARY. The witness having been called for the purpose of disproving charges of adultery within the limits of the pleadings, and having denied some of those charges, I think he is liable to have questions put to him in cross-examination as to all the charges, and that he is bound to answer these questions. I am clearly of opinion that the Attorney General is entitled to prove, by whatever evidence may be legitimate, instances of adultery under the general charge, besides those instances which are specified; and that he is at liberty to cross-examine a petitioner, who has tendered himself as a witness, respecting all the charges that are within the pleadings, including the general charge.]

The petitioner then admitted that he had committed adultery with women whom he had met at the places named in the Queen's

(1) 32 & 33 Vict. c. 68.

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Proctor's 6th plea, although he denied that he had been guilty of adultery with the women whose names were mentioned.

The jury found that the petitioner had been guilty of adultery with two of the women named in the plea, and with women whose names were unknown, and the decree nisi was rescinded, and the petition dismissed.

Solicitor for petitioner: *J. Kearsey.*

April 28.

M., FALSELY CALLED B., *v.* B.

*Suit for Nullity—Decree Nisi—Time to make Absolute—*36 *Vict. c.* 31.

The legislature having extended to suits for nullity of marriage the provisions of 23 & 24 Vict. c. 144, s. 7, whereby a decree nisi for divorce is not to be made absolute under six months unless the Court otherwise direct, the Judge Ordinary will not exercise his discretion to shorten the period in cases of nullity of marriage except under very special circumstances.

THIS was a suit instituted to annul a marriage between the petitioner and respondent, solemnized on the 3rd of March, 1870. In January, 1874, a decree was made by the Judge Ordinary in which such marriage was declared to have been absolutely null and void, and the petitioner to have been, and to be, free from all bonds of marriage with the respondent, unless sufficient cause be shewn to the Court why that decree should not be made absolute within six months from that date. In anticipation of the marriage between the parties, three indentures were executed on the 2nd of March, 1870, by which considerable property, consisting of real estate and money secured on realty, was settled for the benefit of the parties and their issue.

Dr. Spinks, Q.C., and *Lumley Smith*, moved the Court to vary the decree nisi by substituting three for six months as the time at the expiration of which such decree may be made absolute. In cases of nullity of marriage, where there are no children, this Court has no jurisdiction to alter settlements, so that it will be necessary in this case to apply to the Court of Chancery to cancel the indentures; but if the decree is not made absolute for six

months, no such application can be made before the long vacation. The Court must be satisfied by the way the suit has been contested by the respondent that there is no collusion between the parties, and it ought to be borne in mind that by a rule of law no such suit can be instituted until after three years from the time of marriage. They referred to *Fitzgerald* v. *Fitzgerald.* (1)

Searle appeared for the respondent.

Bayford, for the Queen's Proctor, informed the Court he had no present intention of intervening in the suit.

The JUDGE ORDINARY. I regret I cannot comply with this application. It has been very strongly urged that it is not necessary that in cases of nullity of marriage so long a period should elapse as six months before the decree is made absolute, but the legislature has thought fit to say it shall be six months, and this Court must act upon that decision. The period is intended to allow full opportunity for investigating all the circumstances of the case. Up to this time the Queen's Proctor has heard nothing to induce him to intervene, nevertheless, before the decree is made absolute, something may still come to his notice, which may compel him to take that step. The circumstances in *Fitzgerald* v. *Fitzgerald* (1) were very peculiar. The matter had been investigated more than once, leading to great delay, and the Queen's Proctor had intervened, and had had every opportunity to inquire into the particulars of the case. I exercised my discretion, and reduced the time for making the decree absolute. This case does not present any of those peculiarities. From all that took place before me, it would undoubtedly appear that it is a straightforward case. Nevertheless, it may turn out that the Queen's Proctor will have to intervene. It must be taken and understood that the circumstances must be very peculiar to authorize the Court to exercise its discretion, and reduce the time for the decree absolute to a less period than six months.

Attorneys for petitioner: *B. W. & O. Powys.*
Attorney for respondent: *R. Kingdon.*

(1) Law Rep. 3 P. & M. 136.

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July 21;
Aug. 4.

BROWN *v* BROWN AND SHELTON.

Petition for Dissolution of Marriage—Respondent's Prayer for Judicial Separation—Deed of Separation.

The husband and wife lived apart, under a deed of separation, in which a trustee was appointed, a sufficient allowance was secured to the wife, and she had the custody of two children and access to the third. Subsequently the husband petitioned this Court for a dissolution of marriage, by reason of his wife's adultery. She denied the adultery, pleaded cruelty, and prayed for a judicial separation. The acts of cruelty alleged all took place previous to the separation of the parties. The jury found that the respondent had not been guilty of adultery and that the petitioner had been guilty of cruelty:—

Held, that the respondent was entitled to a decree of judicial separation.

In this case, James Samuel Brown petitioned the Court for a dissolution of his marriage with Mary Ann Brown, by reason of her adultery with William Horace Shelton. The respondent and co-respondent denied the adultery, and the respondent pleaded various acts of cruelty against her husband, the last of which was alleged to have taken place in May, 1872, and she asked for a judicial separation. The cause was heard before the Judge Ordinary and a common jury, on the 24th, 25th, and 26th of June last, when the jury found that the respondent and co-respondent had not been guilty of adultery, and that the petitioner had been guilty of cruelty. In June, 1872, the husband had entered into an agreement with his wife that they should live separate. A deed of separation was executed, a trustee appointed, an allowance of 175*l.* per annum was secured to the wife, and she was allowed to have the custody of her two daughters, with access to her son, who resided with his father.

July 21. *Currie* moved for a decree of judicial separation on behalf of the respondent.

Inderwick, Q.C., for the petitioner, opposed the motion. The respondent having elected to live separate from her husband under the deed, the conditions of which her husband has carried out up to the present time, she cannot now ask for a judicial separation for misconduct arising before the deed was executed.

He referred to *Matthews* v. *Matthews* (1), *Hooper* v. *Hooper* (2), *Buckmaster* v. *Buckmaster* (3), *Newsome* v. *Newsome*. (4)

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Cur. adv. vult.

Aug. 4. THE JUDGE ORDINARY. In this case the petitioner prayed for a dissolution of marriage on the ground of adultery of the respondent. The respondent denied the adultery and charged the petitioner with cruelty, and prayed for a judicial separation on that ground. At the trial the jury found that the respondent was not guilty of adultery and that the petitioner was guilty of cruelty. I was asked, on behalf of the petitioner, not to grant a decree of judicial separation, on the ground that the petitioner and the respondent were, at the time of the institution of the suit, living apart, under a deed of separation, the terms of which have always been complied with by the husband, and to the obligation of which he still remains liable. I have several times expressed an opinion that it is not the duty of the Court to discourage the settlement of matrimonial differences by arrangement between the parties rather than by litigation. It is always for the benefit of the children, if there be any, and it is generally to the advantage of the parties themselves that publicity should not be given to their charges and countercharges against one another. A wife who has reason to complain of her husband's conduct may be disposed to submit to very disadvantageous terms rather than injure her children's prospects and run the risk of injury to her own reputation (as in this case, where charges of drunkenness were made against the respondent,) by the unavoidable exposure which must follow if she should institute a suit against her husband. But if the husband, by bringing an unfounded charge against the wife, compels her to make known, in self-defence, her own grounds of complaint against him, the foundation of the settlement between them is removed, and the consideration fails upon which it was entered into. In such a state of things, it is only just that the wife should be remitted to her original position, and should be allowed to claim the fullest redress to which she is entitled. Her rights, under a decree of judicial separation pronounced by this Court,

(1) 1 Sw. & Tr. 499; 29 L. J. (P. M. & A.) 118.

(2) 1 Sw. & Tr. 602; 29 L. J. (P. M. & A.) 59.

(3) Law Rep. 1 P. & M. 713.

(4) Law Rep. 2 P. & M. 306

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are larger and better assured than those that are gained by a deed of separation, and being driven to appeal to the law, she cannot be restrained from claiming all that the law can give her. This is not the occasion to consider what may be the effect of a deed of separation if one of the parties to it should, without fresh circumstances rendering it necessary, institute a suit for judicial separation, or whether it is of any force in answer to a suit for restitution of conjugal rights. The decree of the Court is, that the petition of the husband be dismissed, and that the prayer of the wife for a decree of judicial separation be allowed with costs.

Attorneys for petitioner: *Duffield & Bruty.*
Attorney for respondent: *W. J. Tasman.*
Attorneys for co-respondent: *Chorley & Crawford.*

July 28; *Aug.* 4.

IN THE GOODS OF FARQUHARSON TWEEDALE.

Holograph Will—Testator an Officer in actual military Service—Alterations—Presumption.

Followed. *In the Goods of* NEWLAND [1952] P. 71

Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst as a soldier he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate.

FARQUHARSON TWEEDALE, formerly an officer in the 8th Regiment Bengal Cavalry, died on the 18th of February, 1873, having in the year 1853 been found by inquisition to have been a lunatic from the 20th of November, 1848. From the year 1853 until his death he was confined in a private asylum, Heigham Hall, Norwich. In the year 1842 disturbances broke out in the district of Bundelcund, in India, and a military field force was actually employed for the purpose of suppressing them. In this force was the 8th Regiment Bengal Cavalry, and the deceased, who was then a captain in that regiment, accompanied and went through the campaign with it. It is not known for how long the military operations were continued, or when the special field force was disbanded, but it was some time after the month of February, 1843. On the 24th of February, 1843, at the camp at Bundelcund, the deceased wrote and signed a testamentary paper by which he gave

the residue of his property to his brother Alexander Tweedale, and appointed him executor. He subsequently altered the paper by inserting the name of his brother, William Hutton Tweedale, both as legatee and executor, but no evidence was forthcoming at what time he made such alteration. In addition to his two brothers, the deceased left three sisters, his next of kin; two of them are lunatics, and Alexander Tweedale the committee of their persons and property. The third sister, Mrs. Lushington, and her husband received notice of the intended application to this Court, but declined to interfere in any way.

July 28. *Dr. Swabey*, on behalf of Alexander Tweedale, moved for probate of the will of the 24th of February, 1843, with the alteration therein. The deceased, at the time he wrote and signed the will, was in actual military service, and it is therefore valid although unattested, and, in the absence of evidence to the contrary, the Court will presume that the alterations were made about the same time and include them in the probate.

Dr. Deane, Q.C., appeared for William Hutton Tweedale, and consented to the motion.

The case of *Pechell* v. *Jenkinson* (1) was referred to.

Cur. adv. vult.

Aug. 4. SIR J. HANNEN. The deceased, an officer in the 8th Regiment Bengal Cavalry, was, in 1853, found to be of unsound mind, and to have been so from 1848. He died in a lunatic asylum in February, 1873. He executed a will at Kurtapoor, in India, dated the 29th of August, 1846. This will is attested by two witnesses, brother officers of the deceased, one of whom states that he is unable to depose with respect to the state of mind of the deceased at the time of the execution further than that he was most eccentric whilst serving at Kurtapoor. It further appears that in November 1846, the deceased was found to be labouring under mental aberration to an extent that disqualified him from taking charge of his own affairs. The will itself appears, on the face of it, to be very incoherent. So far as a meaning can be attributed to it, the two brothers of the deceased seem mainly interested under it, and they do not propound it, but desire that it should be treated as invalid. Under these circumstances I am satisfied that the

(1) 2 Curt. 273.

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In the Goods of Tweedale.

deceased was insane at the time when the will was executed. The will, however, will be deposited in the registry in order that any one having an interest under it may propound it if he should think fit to do so. Amongst the papers of the deceased was found a will dated the 24th of February, 1843, entirely in the handwriting of the deceased and signed by him. There is no reason for supposing that the testator was not at that time of sound mind. This will is not attested, but it is proved to have been made whilst the deceased was in actual military service on an expedition which was employed in suppressing disturbances in the Bundelcund district. By this will the deceased, after making certain bequests, leaves the residue to his brothers Alexander and William. The latter name, however, has been added by the testator throughout after the will was written, but whether before or after the signature does not appear. Application was made for probate of this will with the alteration, the addition of William Tweedale's name. I entertain no doubt that probate of the will must be allowed under 1 Vict. c. 26, s. 11, as that of a soldier in actual military service, but the question remains whether the alterations are to be presumed to have been also made whilst the deceased was in actual military service. A somewhat similar question has arisen in reference to non-attested alterations in a will dated before the Wills Act came into operation. *In the Goods of Streaker* (1), Sir C. Cresswell held, on the authority of *Pechell* v. *Jenkinson* (2), and *In the Goods of Pennington* (3), that the presumption is, in the absence of circumstances from which the contrary may be inferred, that the alterations were made before the Act came into operation. I think that an analogous principle is applicable to the present case, and that it is to be presumed that the alterations in the will were made while the testator was still engaged in actual military service. I adopt this conclusion the more readily as Alexander Tweedale, the only person whose interests are affected by the alteration, assents to the probate of the will with the addition of his brother's name. Probate will be granted to Alexander Tweedale, one of the executors named in the will.

Proctors for A. Tweedale: *Tebbs & Sons.*
Proctors for W. H. Tweedale: *Heales & Son.*

(1) 28 L. J. (P. M. & A.) 50. (2) 2 Curt. 273. (3) 1 No. of Ca. 399.

IN THE GOODS OF HALE.

1874
Aug. 4, 7.

*Administration—Nominee of Parties interested—*20 & 21 *Vict. c.* 77, *s.* 73.

The will of the deceased having been set aside by reason of an informality in the execution, the widow and children entered into an arrangement by deed to carry out the intention of the deceased as contained in such will, notwithstanding its informality. The Court refused to grant administration to the executors named in the will under s. 73 of the Probate Act, as the nominees of the parties interested in an intestacy, they themselves having no interest in the property of the deceased.

JOSEPH EATON HALE, late of Somerton, Suffolk, gentleman, died on the 16th of February, 1874. He left a will dated the 14th of January, 1873; but such will was on the 9th of June, 1874, declared invalid in this Court, as not having been duly executed according to the provisions of the statute 1 Vict. c. 26 (see *Phipps* v. *Hale* (1) In March, 1874, the widow and children of the deceased, the only persons entitled to his property in case of an intestacy, executed a deed by which they agreed that all the trusts of the will should be carried into effect, as if it had been admitted to probate, and they nominated the Reverend Edward James Phipps and William Biddell, the executors named in the will, to take administration of the effects of the deceased on their behalf. It appeared from the affidavits that on the 14th of January, 1873, after the execution of his will of that date, the deceased, with the assistance of his daughter Mary Anne Prosser Hale, tore up, burned, and destroyed an earlier will, dated the 1st of September, 1870.

Aug. 4. *Dr. Deane, Q.C.* (*Searle* with him), moved the Court to grant administration to Messrs. Phipps and Biddell of the goods of the deceased, or probate of the draft or copy of the earlier will, dated the 1st of September, 1870, in which also they were named executors. Under s. 73 of the Probate Act, the Court has a power to appoint a person to be administrator of the estate of a deceased other than the person who according to the practice would be entitled thereto, if it appear to be convenient or necessary to do so by reason of the insolvency of the estate of the deceased or

(1) Ante, p. 166.

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other special circumstances. All the parties have a full knowledge of their rights and are desirous that the administration should be granted as prayed. [He referred to *Farrell* v. *Brownbill* (1), and *Teague* v. *Wharton*. (2)]

Dr. Spinks, Q.C. (*Pritchard* with him), for the widow and children, supported the motion.

Cur. adv. vult.

August 7. SIR J. HANNEN. In this case there was a defective attestation of the last will of the deceased. The first question that arises is as to an earlier will, in reference to which it was suggested that it might possibly be established on the ground that its revocation by the imperfectly executed will was a dependent relative revocation, and the last will failing the earlier one might be established. I have come to the conclusion that as none of the parties interested under the earlier will desire to propound it, I am not called upon to insist upon its being proved, and that I am at liberty to deal with the matter on the evidence now before me. In this state of things I am prepared to treat the case as one of intestacy. That being so, a further question is raised; I am asked to grant administration not to the widow who would be entitled to it in the ordinary course, but to certain persons named by her and the children of the deceased under the power conferred on the Court by s. 73 of the Probate Act. Now the power of the Court and the mode in which its discretion should be exercised under that section have frequently been under the consideration of my predecessor, and in the cases referred to in the argument, *In the Goods of Richardson* (3), and *Teague* v. *Wharton* (2), Lord Penzance went fully into the matter, and it must be taken that he has defined the circumstances under which the Court will act under the 73rd section. I do not feel myself at liberty to depart from the principles laid down in those cases. Applying them to the present case, it must be taken that Lord Penzance held that the mere fact that the persons who would be entitled to administration desire that some one else should be appointed administrator, does not constitute such a special state of

(1) 3 Sw. & Tr. 467; 33 L. J. (P. M. & A.) 185.

(2) Law Rep. 2 P. & M. 360.

(3) Law Rep. 2 P. & M. 244.

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circumstances as to justify a grant under the 73rd section. I feel bound to follow the decision of my predecessor. In one case, Lord Penzance indicated the proper course to be pursued under the circumstances: *In the Goods of Bullar.* (1) On a similar application he said, "What you ask is contrary to the practice, but there is no objection to your clients taking the grant and then appointing a nominee to be their attorney." That is the course to be pursued in the present case. The grant of administration will be made to the widow, and if she desires, as it is natural that she should, that these gentlemen who were appointed executors by her husband should act for her to carry out the arrangement which has been entered into, she can do so by a power of attorney authorizing them to act for her. She will have leave to withdraw her renunciation if she pleases, and to take the grant.

Attorneys for applicants: *Walter, Moojen, & Son.*
Attorney for the widow and children: *Thomas Harwood.*

Nov. 18.

IN THE GOODS OF PROTHERO.

Administration with Will annexed—Insolvent Estate—Grant to a Legatee limited to Trust Property.

The deceased by his will made his wife sole executrix and residuary legatee. By a codicil he devised and bequeathed to A. B. all property held by him upon any trust or by way of mortgage. The deceased died insolvent, and the widow renounced probate of the will and codicil as executrix, and administration as residuary legatee. The Court granted administration with the will and codicil annexed, to A. B., limited to the trust property so far as it was personalty left to him by the codicil.

CHARLES PROTHERO, of Llanvrechva, Monmouthshire, and of Montpellier Terrace, Cheltenham, Gloucestershire, died on the 16th of June, 1874, having executed a will without date, in which he appointed his wife Sophia Cecilia Prothero sole executrix and residuary legatee. He also made a codicil thereto, dated the 30th of January, 1871, in which he devised and bequeathed to Charles Burton Fox all property held by the deceased upon any trust or

(1) 22 L. T. (N.S.) 140.

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by way of mortgage. The deceased died insolvent, but left trust estates, hereditaments, and premises, of great variety and value, to be administered. Mrs. Prothero renounced, as executrix, probate of the will and codicil, and, as residuary legatee, administration with such will and codicil annexed. The next of kin of the deceased were three children of full age, who were willing to renounce administration of the goods of the deceased, and as parties entitled in distribution there were two infant grandchildren of the deceased.

Nov. 17, 1874. *Pritchard* moved for administration with the will and codicil annexed to be granted to Mr. Fox, limited to the trust estates devised to him by the codicil. He relied upon the cases: *In the Goods of Steadman* (1); *In the Goods of Biou* (2); *In the Goods of Watts* (3); a similar application was refused on the ground of the inconvenience of having diverse representatives to the different parts of the estate, but that would not arise in this case: *In the Goods of Somerset.* (4)

Cur. adv. vult.

Nov. 18. SIR J. HANNEN. I think this grant may go in a limited form. But it appears to be uncertain, from the papers before me, what is the nature of the property that has vested in Mr. Fox. It would appear, from the general language used in the codicil, as if it were merely realty. It must be shewn to the satisfaction of the registrar that there is personalty to which the grant would be applicable, and it will be limited to such personal property as vested in him under the provisions of the codicil to the deceased's will.

Attorneys: *Hunt & Son.*

(1) 2 Hagg. Eccl. 59.
(2) 3 Curt. 739.
(3) 1 Sw. & Tr. 538.
(4) Law Rep. 1 P. & M. 350.

IN THE GOODS OF HORSFORD. 1874 Dec. 2.

Will—Execution—Testimonium and Attestation Clauses with Signature on a separate Paper attached to Instrument by String—Alterations unattested—Paper pasted over Legacies.

The deceased signed his name and the witnesses attested such signature on a piece of paper upon which no dispositive part of the will was written. This paper was attached by string to the paper on which the will was written just opposite to the termination of the writing. On the evidence of the witnesses that the papers, to the best of their belief, were in the same state when they signed them as they are now: it was held that the execution was valid.

Where a testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the Court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the Court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper.

GEORGE FAHIE HORSFORD, late a captain in Her Majesty's service unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where the witnesses signed their names. At the top of the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868.—Geo. F. Horsford, Captain unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics: "I leave the interest on 309*l.* 9*s.* 6*d.* bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C.B., for his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th regiment; and after her death the principal of the said bank stock *to Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime the interest of

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the sum of 174*l.* 2*s.* 3*d.* reduced 3 per cent annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C.B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal *to Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*" Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner. It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne. The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford. Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82, Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with my bank stock, for her sole use. I leave and bequeath *ten* pounds, *which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut.-Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. The witnesses, Captain Hedley and Mrs. Bourne, who attested both documents, in their affidavit, stated that at the execution of the will they had no opportunity of observing the earlier pages of it, and did not notice whether the strips of paper now pasted thereon were there at the time of attestation. That, as regards the codicil, they subscribed their names in the presence of the deceased and of each other, having been requested

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by testator to attest his signature thereto. That they did not see the will at the time of the execution of the codicil. That the codicil is now in the same plight and condition as it was at the time of attestation, save that they did not see the first page of the said codicil, and they are unable to say what was written on that page nor whether the pieces of paper were pasted on, or if anything was written thereon. That the writing on the second page of the codicil was then about the same as now.

The Court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in Court. On the 1st of December they were examined. Captain Hedley stated that he knew Captain Horsford, who had asked him on two occasions to witness papers. That in the summer of this year he was present in deceased's room. Mrs. Bourne, the landlady, was also there. He, Mrs. Bourne, and Captain Horsford, were only present. Deponent asked no questions. He could not say whether he saw deceased's signature. Deceased asked him to witness a paper. He did not recollect whether there was a name on the paper. It was a sitting-room. Deceased was standing. There were pens and ink on the table. He could not recollect anything else. The deceased asked him to sign, which he did. He believed the paper was then attached as now. He did not notice the deceased's name, or whether the paper was signed. He was not accustomed to business. Mrs. Bourne deposed that Captain Horsford lodged in her house. He had asked her to witness papers twice. In the summer, about July last, he asked her to come into his room with Captain Hedley to sign a paper. She did not see him sign it. It was signed before she entered the room. Captain Hedley was in the room before she was. She saw Captain Hedley sign. Captain Horsford produced the paper. To the best of her recollection all the writing as it now appears on the paper was there when she signed.

Nov. 10, 1874. *Nugent* applied to the Court to grant probate of the will and codicil. He referred to *In the Goods of Huckvale* (1); *In the Goods of Puddephatt.* (2)

Cur. adv. vult.

(1) Law Rep. 1 P. & M. 375.

(2) Law Rep. 2 P. & M. 97.

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Dec. 2. SIR J. HANNEN. The testator, George Fahie Horsford, deceased, made his will, bearing date the 1st day of April, 1868. It covers four pages of a sheet of foolscap, and continues on the fifth page, being the first of a second sheet. At the bottom of the fifth page is a formal attestation clause, and the signature of the witnesses are added below the clause. The signature of the testator appears at the top of the sixth page, preceded by these words: "To which will and testament I hereunto annex my seal and signature, dated this 1st April, in the year of our Lord 1848." The attesting witnesses state that, to the best of their recollection, the testator shewed and acknowledged to them his signature, signed on the will on the upper part of the sixth page of the said paper, and that then they signed the attestation thereof. I think that the execution of the will by the testator is valid, notwithstanding the position of the signature, by virtue of the statute 15 Vict. c. 24. There is also a codicil, dated the 29th of July, 1874, in which the signature and attestation of the witnesses are on a separate sheet, attached by a string to the codicil. The evidence of the attesting witnesses is not very clear as to what occurred at the time of execution, but I have come to the conclusion that the sheet was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before the attestation. A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence shewing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will or codicil with the hidden passages in blank, or ought I to endeavour to ascertain what words have been covered up, and include them in the probate? As to the will, the answer to these questions depends upon the construction to be put on the 21st section of the statute 1 Vict. c. 26, by which

it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the Act, Sir H. J. Fust, in *Townley* v. *Watson* (1), decided that the construction to be put upon the words of the 21st section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent?'" I think it is impossible to read the words of the statute, and not say that it was the intention of the legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament. Mr. Justice Williams (Executors, p. 139, 6th ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking, the Ecclesiastical Court will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be

(1) 3 Curt. 761.

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proper to adopt such means. I think that the word "apparent" in the 21st section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this Court is not bound to take any steps to undo what he had done. The statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the Court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection, the probate must go with those parts in blank. But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the Court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found with* (to which the same remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.

Attorney: *T. H. Strangways.*

FAIRLAND *v.* PERCY AND OTHERS. 1875 *Feb.* 9.

Will—Power to carry on Business—Debts incurred by Administratrix in so doing—Administration de bonis non—Creditor.

The deceased by his will directed his executors and trustees (who, however, did not act) to permit his wife to receive the rents and annual profits of his estate, and to carry on his business of a draper for her natural life. She took administration with the will annexed, of the goods of the deceased, and, in carrying on the business, incurred debts to many persons, more especially to the plaintiff. She died intestate and insolvent, and the parties entitled to the reversion of the deceased's estate having been cited did not accept administration of the unadministered estate of the deceased:—

Held, that, as the estate of the widow was primarily liable for the debts contracted by her in carrying on the business, the plaintiff must first take administration to her effects before he could be entitled to a grant of administration de bonis non of the estate of the deceased.

ROBERT PERCY, of Easington, in the county of Durham, tailor and draper, died on the 7th of February, 1869, having made his will, dated the 9th of March, 1868, and therein appointed William Peacock and Henry Fenwick executors and trustees. The material clauses of the will were as follows:—

"I give, devise, and bequeath unto my said trustees, their heirs, executors, and administrators, all my real and personal estate whatsoever and wheresoever, and of whatever nature or kind soever, which I may be possessed of at the time of my decease, upon trust to permit and suffer my dear wife to receive the rents and profits and to carry on my business of a tailor and draper for the term of her natural life, if she shall so long remain my widow; and from and after her decease, or second marriage, I direct that my said trustees, or the survivor of them, his executors or administrators, or other the trustee or trustees for the time being of this my will, who may be appointed as hereinafter mentioned, may and shall as soon as conveniently may be after my decease sell and convert into money all such parts of my said trust estate as shall not consist of money, either by public auction or private contract, and for such price or prices as can be reasonably had or gotten for the same with liberty to buy and resell the same or any part thereof

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without being answerable for any loss in price by such re-sale, and do and shall collect and get in and receive all moneys due and owing to me, and do and shall stand possessed of and interested in the moneys to arise and be produced from such sale or sales, and all my money to be gotten and received as aforesaid, upon trust, after retaining all such costs and expenses as they may incur in or about such sales or sale or otherwise, to pay and divide the same equally amongst all and every my child and children, share and share alike, as tenants in common, upon the youngest of my children attaining the age of twenty-one years or dying under that age; and in case any of my said children shall die under the age of twenty-one years unmarried, or married without leaving any lawful issue him or her surviving, then I direct that the shares or share of him or her dying as aforesaid shall be equally divided amongst the survivors. And I also direct that in case any of my said children before mentioned should die under the age of twenty-one years, leaving lawful issue him or her surviving, then that the shares or share of such children or child so dying as aforesaid shall be divided equally amongst their, his, or her respective issue, such issue standing in the place and taking their deceased parent's share. . . . . And I absolve the trustees or trustee for the time being of my will from responsibility for the acts and defaults of each other, and from involuntary losses, and also authorize such trustees and trustee to retain and allow to each other all expenses incurred in or about the execution of the trusts of my will."

The executors and trustees, Messrs. Peacock and Fenwick, renounced probate of the will, and did not accept the trusts nor in any way act therein, and no new trustees have been appointed. On the 12th of October, 1869, administration with the will annexed of the goods of the deceased was granted to his widow, Martha Percy, as the universal legatee for life named therein. She carried on the testator's business until the 14th of January, 1874, when she died a widow (never having married again) intestate, and insolvent, and no administration has been granted of her estate. With the exception of a policy of insurance for 100*l.*, the whole of the testator's property was employed by Mrs. Percy in carrying on the business, and in so doing she incurred liabilities to the

plaintiff, Matthew Fairland, a woollen manufacturer, trading at Huddersfield as John Stott & Co., and in consequence thereof the estate of Robert Percy, the deceased, in the opinion of an equity counsel, is indebted to the plaintiff in the sum of 399*l.* 16*s.* 4*d.* The property of the deceased, at the time of his death, consisted of stock-in-trade, 1153*l.* 14*s.*; book debts, 2824*l.* 1*s.* 3*d.*; policy of insurance, 100*l.*; and furniture, 96*l.*; from which had to be deducted 1014*l.* 15*s.* due to trade creditors, and 707*l.* 6*s.* 5*d.* bad debts, leaving a balance of 2451*l.* 13*s.* 10*d.* The unadministered estate consists of the household furniture, the insurance for 100*l.*, and book debts agreed to be sold for 600*l.* On the 9th of January, 1875, Mr. Fairland took out a citation calling upon the parties interested in the estate to take administration with the will annexed of the unadministered effects of the deceased, or to shew cause why it should not be granted to him as an equitable creditor of the deceased. To this citation no appearance was entered.

Jan. 26. *H. Sutton* moved the Court to grant such administration to Mr. Fairland. As the widow has died insolvent, and the deceased directed that his whole estate should be employed in carrying on the business, the plaintiff is entitled to recover against the deceased's general estate the amount of his debt, although such debt was not incurred until after the death of the deceased; and, therefore, as the parties interested under the will refuse to take administration, he is entitled to it. He referred to *Ex parte Garland* (1); *Cutbush* v. *Cutbush* (2); *Owen* v. *Delamere.* (3)

Cur. adv. vult.

Feb. 9. SIR J. HANNEN. In this case the plaintiff claims to be a creditor in equity of the estate of Robert Percy, deceased, and as such creditor asks for administration (with the will annexed) of the unadministered personal estate of the deceased. The testator, by his will dated the 9th of March, 1868, appointed William Peacock and Henry Fenwick trustees and executors, and gave, devised and

(1) 10 Ves. 110. (2) 1 Beav. 184.
(3) Law Rep. 15 Eq. 134.

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bequeathed to his said trustees all his real and personal estate upon trust to permit and suffer his wife to receive the rents and profits and to carry on his business as a tailor for the term of her natural life, if she should so long remain his widow, and from and after the decease or second marriage of his said wife he directed the trustees to sell and convert into money all parts of his estate not consisting of money, and to divide the proceeds amongst his children as tenants in common. William Peacock and Henry Fenwick refused to accept the trusts of the will, and duly renounced probate, and thereupon administration with the will annexed of the personal estate and effects of the deceased was granted to the widow, who, under the authority given to her to carry on the business, continued to do so down to the time of her death in January, 1874. She did not marry a second time. While she so carried on the business, the plaintiff and his partner (trading under the style of Stott & Co.) supplied goods to the widow in the way of the said trade of a tailor, to the amount of £399 16*s.* 4*d.*, and this debt remains wholly unpaid, and the plaintiff and his partner hold no security for any part of it. The plaintiff claims in respect of this debt to be an equitable creditor of the estate of Robert Percy, deceased. All parties interested in the estate of the deceased have been cited, but do not appear. It appears that Martha Percy, the widow of the deceased, died wholly insolvent, and left no property out of which the plaintiff's debt can be satisfied. There can be no doubt that Martha Percy was originally the legal debtor of the plaintiff's firm, and that had she or her estate been solvent they would have been bound to look to her or her estate for payment, and that no claim could have been made against the estate of the deceased. But the cases cited in argument shew that where a testator by his will directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business, in addition to the personal responsibility of the individuals who give the order for the goods or otherwise contract the debt, are entitled in equity to claim against the estate of the testator, to the extent that he authorized it to be used in the business.

This is clearly laid down by Lord Eldon in *Ex parte Garland* (1): "As to creditors subsequent to the death of the testator, in the first place, they may determine whether they will be creditors. Next, it is admitted they have the whole fund that is embarked in the trade, and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else." The same principle is laid down in the other cases, the only one of which I need refer to is that of *Owen* v. *Delamere* (2), recently decided by Sir J. Bacon, V.C. In that case a creditor of a business, carried on after the death of a testator with a portion of his estate in accordance with the directions of his will, filed a bill for the administration of the testator's personal estate, as in a creditor's suit. This bill was dismissed by the Vice-Chancellor on the ground that as it appeared that the persons who carried on the business and had contracted the debt were solvent, the plaintiff's remedy was by action at law against them, and not by an administration suit in the Court of Equity. And the Vice-Chancellor more than once points out that the case would be different if, as in the present case, the person primarily liable were insolvent. He says: "An executor authorized to carry on a business, who carries it on, is liable for every shilling on every contract he enters into; besides that, if he becomes bankrupt, the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration." And again: "There can be no doubt about the principles on which a Court of Equity deals with such a case: the Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to the purposes of the trust that estate which the testator designated and directed to be employed for that purpose. As Lord Eldon points out in *Ex parte Garland* (1), the creditor has not only the personal remedy against the executor, but he has a right also, if that should fail, to come against the trust estate: and so here, if an action had been brought

(1) 10 Ves. 110. (2) Law Rep. 15 Eq. 134.

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against the defendants, and a fruitless judgment had been recovered against them, there would have been a right to go against the trust estate which the testator committed to the executors if it should be in existence in specie." I think that these passages establish that the plaintiff, in the existing state of facts, is an equitable creditor of the personal estate of Robert Percy, the deceased, in respect of the debt which the testator's widow contracted in the course and for the purpose of carrying on the business. In arriving at the conclusion that administration may be granted to the plaintiff as an equitable creditor, I am fortified by the decisions in analogous cases where administration has been granted to persons as creditors of a deceased's estate in respect of debts not contracted by the deceased or in his lifetime. I allude to the cases of undertakers and those who have been at the expense of burying the deceased: *Spitty's Case* (1); *Newcombe* v. *Beloe.* (2) It will be seen that my decision is based on the assumption that the estate of Martha Percy, the widow, is insolvent. As no opposition has been offered to the motion, the fact of this insolvency rests on the affidavit of the applicant; but though the estate may be insolvent, it is highly improbable that it is absolutely nil. On the contrary, it is highly probable that there must be some trade debts due to the widow, and not to the estate of her deceased husband; and, further, it is possible she may have other creditors than trade creditors. I think, therefore, it is necessary that the plaintiff should in the first place, as a legal creditor of the widow, take out administration to her estate. And further, as the interests of persons not before the Court may be affected, I shall impose the condition that justifying security be given.

Proctor: *H. C. Coote.*

(1) Coote's Practice of the Court of Probate, 6th ed. p. 94.
(2) Law Rep. 1 P. & M. 314.

OUSEY *v.* OUSEY AND ATKINSON.

1874
April 30.

Separation before Adultery complained of—Reasonable Excuse for Separation—Non-consummation of Marriage.

A husband petitioning for a dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The respondent did not deny the fact of non-consummation, but alleged that the petitioner was to blame for it owing to his physical incapacity. The Court, without deciding the question of fact whether the non-consummation was the fault of the petitioner or of the respondent, came to the conclusion that the petitioner had acted under a bonâ fide belief that the respondent had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution on the ground of the respondent's adultery.

1 P.D. 57

THE petitioner, who was a commercial traveller, married the respondent on the 17th of December, 1868, and they lived together at Ashton-under-Lyne until the 29th of May, 1869, when he separated from her. He had made no provision for her maintenance, except from November, 1869, until the beginning of 1871, when he paid her 8*s.* a week, in consequence of an application made by her to the board of guardians for an order against him. It was proved, and was not disputed, that in and since 1872 she had cohabited with the co-respondent as his wife, and that she had given birth to a child of which he was the father. The respondent originally pleaded a mere traverse of the adultery charged, but she afterwards, by leave of the Court, amended her answer, and alleged that the petitioner had separated himself from her without reasonable excuse, and had deserted her, and had thereby been guilty of wilful neglect and misconduct conducing to her adultery. She was examined in support of this allegation, and she stated that the marriage had never been consummated in consequence of the incapacity of the petitioner, and that she therefore considered it null and void. The petitioner admitted that the marriage had never been consummated, but alleged that he had always been able and willing to consummate it, and that the respondent had persistently refused to allow him to do so; that this refusal on her part was the cause of his separating himself from her, and that he would have been willing to return

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to her if she would have consented to cohabit with him as a wife.

Searle (*Burder* with him), for the petitioner.

Inderwick, Q.C., for the respondent.

[The following cases were cited: *Yeatman* v. *Yeatman* (1); *Townsend* v. *Townsend* (2); *Jeffreys* v. *Jeffreys* (3); *Haswell* v. *Haswell* (4); *Pearman* v. *Pearman.* (5)]

THE JUDGE ORDINARY. This is a very peculiar case. Both parties agree in the fact that the marriage has not been consummated, and it is therefore evidently to the advantage of both that it should be dissolved. The present mode of investigating the question which has been raised of which of them is to blame for the existing state of things is certainly unsatisfactory. It may be that the husband has taken the course of instituting a suit in this form in order to avoid the shame of the fact appearing that he is not competent. The respondent, on the other hand, may be actuated by a desire to defend herself in this way against the charge of violating her duty as a wife. At all events, I have at present no satisfactory means of determining the question which has been raised between them. It ought to have been raised by one or the other in a suit for nullity. It is a grave matter of observation that the respondent did not put forward the case which she now sets up in the first instance. When the application was made to amend the answer I inquired the reason why such a defence had not been brought forward at the earliest moment, and no excuse was given for the delay. These two persons are in direct opposition to each other on a fact the knowledge of which is confined to themselves, and without the evidence of medical men I have no means of deciding between them. The fact that the respondent had a child at a later period by no means disposes of the matter. I must take it that the question of whose fault it was that the marriage was not consummated is one on which I am not able to arrive at any definite conclusion. I must add that from

(1) Law Rep. 1 P. & M. 489.
(2) Law Rep. 3 P. & M. 129.
(3) 3 Sw. & Tr. 493; 33 L. J. (P. M. & A.) 84.
(4) 1 Sw. & Tr. 502; 29 L. J. (P. M. & A.) 21.
(5) 1 Sw. & Tr. 601; 29 L. J. (P. M. & A.) 54.

my experience in such cases when they have been investigated in a proper manner, it is a question upon which a man and woman may sometimes for a considerable time, if not for ever, remain in doubt. It may possibly be merely nervousness on the one side or the other which has contributed to the disappointment of both. I think I am justified on the evidence before me in saying that it may well have been a matter of doubt between these two persons on which side the fault or physical defect lay. In such a state of things, I think that a husband taking the view that the fault was not with himself but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and therefore, leaving her, cannot be said to have been guilty of such desertion as is contemplated by the statute. His proceeding, if a mistaken one, would, I think, under such circumstances, be excusable, and the Court would not be bound by reason of it to visit on him the penalty of depriving him of the relief to which he would otherwise be entitled in event of the wife not remaining constant to him.

That is the view which I take of the present case. Although, perhaps, what the husband did may not be altogether what he ought to have done and what he might be expected to do; although he may not have acted generously in leaving the wife without any means of support until he was compelled to contribute to her support, yet assuming, as I do, that he so acted in consequence of the unhappy state of things existing between them; and in consequence of a bonâ fide belief on his part that she was wronging him, I think that cannot be treated as desertion; and I am not bound to refuse him the relief he seeks. There will, therefore, be a decree nisi, but the co-respondent must equally with the petitioner have the benefit of my opinion, that he and the respondent acted on the bonâ fide belief that her marriage with the petitioner was void, and therefore the co-respondent will not be condemned in costs.

Solicitor for petitioner: *Joseph D. Nelson.*

Solicitors for respondent: *Rowley, Page, & Rowley.*

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Nov. 24.

HOPE *v.* HOPE AND ERDODY.

Dissolution of Marriage—Variation of Settlement—Appointment of new Trustees—22 & 23 Vict. c. 61, *s.* 5.

The Judge Ordinary has no power, under 22 & 23 Vict. c. 61, s. 5, to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage, the dissolution of which it has decreed.

THIS was a suit for dissolution of marriage instituted by Adrian Elias Hope against his wife, Lady Louisa Alice Hope, by reason of her adultery with Count Erdody. The marriage took place on the 3rd of June, 1867, and there were issue thereof three children, Agnes Henrietta Ida Hope, born the 5th of April, 1868, Mildred Louisa Annie Hope, born the 15th of June, 1869, and Ethel Alexina Alice Hope, born the 1st of February, 1871. A decree nisi was pronounced on the 14th of November, 1873, which was made absolute on the 2nd of July, 1874. On the same day a petition was filed, under 22 & 23 Vict. c. 61, s. 5, praying the Court to alter the trusts contained in the settlement made on the marriage of the parties. It set out the contents of the settlement, and stated that it had been agreed between the parties that all the trust funds settled by the petitioner shall be applicable, and all such power of appointing new trustees, or of appointing any portion of such trust funds, or of consenting to, requesting, or directing any investment, or change of investment, or any application of the capital or income of the same, or any part thereof, and all other powers and authorities whatever shall henceforth operate and be exercisable in the like manner, and by the like person or persons, as if the respondent had died on the day of the date of the order to be made on the petition. It further stated that the petitioner was willing to allow the respondent 2000*l.* per annum during the joint lives of the petitioner and respondent, and 3000*l.* per annum on his death during the life of the respondent, or so long as she remained unmarried, and so long as a sum to which she was entitled remained reversionary, and 1500*l.* per annum after the death of the petitioner if the respondent should marry again or her reversionary interest fall in.

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On this petition the registrar reported as follows: "In this case the petitioner has obtained a decree absolute, and this petition is for some alteration in the trusts of the settlement. There are three children of the marriage, who are in the custody of the petitioner. A very large sum was settled by the petitioner, and a reversion to the sum of 30,000*l.* was settled by the respondent. By consent of both parties all that is asked is that the respondent's interest in and powers of appointment over the sum settled by the petitioner should be extinguished, as if she were naturally dead, and that she should retain her beneficial interest in the reversionary sum of 30,000*l.*, and her power of appointment therein, where there is no issue to take a vested interest, saving that any variation of the investment of this fund should not require her assent, and that the joint power of appointment over this fund among the issue of the marriage now vested in the petitioner and the respondent, and the survivor should be vested and exercised by the petitioner only. I see no objection to this course."

Nov. 10, 1874. *Day, Q.C.*, and *Hemming*, for the petitioner, applied to the Court to carry out the agreement of the parties and to confirm the report of the registrar.

Dr. Spinks, Q.C., appeared for the respondent, and consented to the motion.

Inderwick, Q.C., and *Stephen*, for the trustees of the deed of settlement, submitted that, although the Court could give direction to the trustees from time to time in what way they should exercise the trust, it has no jurisdiction to interfere with the appointment of new trustees.

Cur. adv. vult.

Nov. 24. THE JUDGE ORDINARY. In this case I wished to have an opportunity to look at the settlement, which I was requested to vary. The main point reserved for my consideration was, whether I should interfere with the wife's right to join in the appointment of fresh trustees. I think that I ought not to do so, and I have great doubt whether I have the power to vary a settlement in that manner. By the statute I am authorized to make

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orders with reference to the application of a whole or portion of the property settled, and it seems to me that it would be a straining of the language of the statute to say that that power includes the depriving the wife of her right in reference to the appointment of trustees. In this case, however, even if I have the power, I think I ought not to exercise it, because a sum of 30,000*l.* in reversion belonging to the respondent forms part of the settlement, and the trustees to be appointed will not be trustees only of the money brought into settlement by the petitioner, but also of the 30,000*l.*, and therefore it would be wrong to interfere with her power in respect of their appointment. All the grounds which existed, or were contemplated to exist, remain to shew that the respondent should have power to exercise her judgment as to the proper persons to be appointed trustees of that fund. I therefore decline to carry out the agreement of the parties on that point, but in all other respects I confirm the registrar's report. (1)

Attorneys for petitioner: *Young, Jackson, & Co.*
Attorneys for respondent: *Lyne & Holman.*

(1) The order was drawn up in the following form:—

"24th Nov. 1874. On the application of counsel for the petitioner, with the consent of counsel for the respondent, and upon hearing counsel for the trustees of the settlement hereinafter mentioned, and on the petitioner undertaking to enter into a covenant to pay to the respondent as on and from the 26th day of May, 1874, by equal quarterly payments on the 26th day of August, the 26th day of November, the 26th day of February, and the 26th day of May, an annuity varying in amount as follows, namely: 2000*l.* per annum during the joint lives of the petitioner and respondent, to be increased to 3000*l.* after the death of the petitioner during the life of the respondent, if and so long as she shall not have married again, and if and so long as the sum of 30,000*l.* hereinafter mentioned shall remain reversionary in interest, to be reduced to 1500*l.* after the death of the petitioner, if and when the respondent shall have married again, or if and when the said sum of 30,000*l.* shall have ceased to be reversionary in interest; whichever of such events shall have first happened, The Judge Ordinary ordered that from and after the date of this order, the indenture bearing date 1st June, 1867, being the indenture of settlement made in contemplation of the marriage of Adrian Elias Hope, the petitioner, and Lady Ida Louisa Alice Hope, the respondent in this cause, be varied as follows: that is to say, that all the trusts, covenants, and provisions in the settlement contained in favour

of the respondent shall cease from the date of this order, save and except the trusts and provisions hereby reserved, and save as aforesaid the trust funds shall be applicable as if she had died on the day of the date of this order. And all powers of appointing any portion of the trust funds, or of consenting to, requesting, or directing any investment, or change of investment, or any purchase, sale, or demise, or any application of the capital or income of the trust funds, or any part thereof; and all other powers and authorities whatsoever which are by the said settlement vested in the respondent either solely or jointly with the petitioner, save and except the power of appointing new trustees, and the other powers hereby reserved, shall cease from the date of this order, and save as aforesaid all such powers of appointing any portion of the trust fund, or of consenting to, requesting, or directing any investment or change of investment, or any application of the capital or income of the trust funds, or any part thereof, and all other powers and authorities whatsoever, shall thenceforth operate and be exerciseable in the like manner and by the like person or persons as if the respondent had died on the day of the date of this order. And further ordered that, subject to the variations hereinafter mentioned, the respondent shall retain the beneficial interest by the settlement given to her after the death of the petitioner in the reversionary sum of 30,000*l.* brought into settlement by her, and her power of appointment over the same, in favour of any after-taken husband, or in favour of her issue by any such after-taken husband, and her general power of appointment over the said reversionary sum in default of children of the marriage, and her power or powers of joining in the appointment of, or of appointing new trustees, and her power of consenting to, directing, or requesting any investment or change of investment of the said sum of 30,000*l.* And further ordered that the trusts of the settlement declared of the said reversionary sum of 30,000*l.* be confirmed, with the variation following, that is to say, that the power of appointing the said reversionary fund to or among the issue of the marriage of the petitioner and respondent by the settlement vested in the petitioner and respondent jointly, and the survivor, and all other powers whatsoever relating to the said sum of 30,000*l.*, save the powers hereby expressly reserved to the respondent, shall be vested in and exerciseable by the petitioner alone, and shall operate in like manner as they would have done under the said settlement, if exercised by the petitioner and respondent jointly."

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Jan. 19.

A. *v.* A.

Suit for Restitution of Conjugal Rights—Hearing in Camerâ—Practice.

In every matrimonial suit, which before the passing of the Divorce Act (20 & 21 Vict. c. 85), might have been determined in an Ecclesiastical Court, the Judge Ordinary may, if he considers the circumstances of the case to require it, direct that the hearing shall take place in private.

THIS was a suit for restitution of conjugal rights brought by the wife; the respondent set up a charge of cruelty, and prayed for a judicial separation. The cruelty alleged was the writing a letter charging the respondent with unnatural practices. On taking the Court's directions as to the mode of trial,

Dec. 15, 1874. *Dr. Tristram,* for the respondent, asked that the question at issue should be determined before the Court itself in camerâ.

Bayford, for the petitioner, objected to that course, and applied that the case should be heard before a special jury in open Court.

Cur. adv. vult.

Jan. 19. THE JUDGE ORDINARY. This case was argued before me last term. It is a suit for restitution of conjugal rights, in which certain charges of unnatural practices have been alleged. It has been the usual practice to hear such cases in camerâ, but on this occasion that course has been objected to, and I took time to consider whether or not I have authority to try such a matter in camerâ, and if so, whether in the exercise of my discretion I should do so in this case. In the early period of the existence of this Court, it seems to have been doubted whether the Court could under any circumstances hear even a suit for nullity of marriage in camerâ. The question was discussed in the case of *H., falsely called C.,* v. *C.* (1) That was a petition for nullity of marriage, and there the Judge Ordinary, Sir C. Cresswell, said, "My own impression on the point I have already had occasion to mention, namely, that we have no power to hear any case otherwise than

(1) 1 Sw. & Tr. 606.

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in open court; but as I now have the advantage of the assistance of my learned Brothers, I will confer with them." And subsequently Mr. Justice Williams and Mr. Baron Bramwell, sitting with the Judge Ordinary, gave their opinions that the Court had no power to sit otherwise than with open doors. It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camerâ both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir C. Cresswell was afterwards abandoned. The practice must now be considered as settled, and all cases which could have come before the old Ecclesiastical Courts, and might have been heard by those Courts in camerâ, this Court has power to investigate in private. In cases however of dissolution of marriage which arise under the Acts constituting the Court, this course of investigation cannot be pursued, but this Court must proceed in the way usual in other Courts. That was decided in *C.* v. *C.* (1), where the Judge Ordinary said, "I have considered the matter, and I think I have no power to hear the case in camerâ. The only causes which have been heard in private are suits for nullity of marriage, and in so doing the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the statute 20 & 21 Vict. c. 85, s. 22. There is, however, nothing at all in that statute which gives such a power to the Court in suits for dissolution of marriage, and in one of the amendment Acts a clause which had been introduced for the purpose of giving such a power was rejected by the legislature. I think I am bound to hear the case in open Court." I have here a distinct expression of opinion that suits which the Ecclesiastical Courts would have heard in camerâ I still have power to hear privately. It does not appear, however, that the Ecclesiastical Courts did, in fact, hear cases in private merely because the investigation might involve an inquiry into charges of unnatural practices. At any rate, I do not find any report of an application to hear such cases in camerâ. It does not follow that when such charges are made the investigation of them will necessarily be of such a character as to require the exclusion of the public, for in Courts of

(1) Law Rep. 1 P. & M. 640.

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justice we cannot be over fastidious in such matters, and disagreeable as it may be to inquire into the truth of such charges, it must be done if circumstances require it, whether few or many persons are present. But I am of opinion that there may be cases in which it would be desirable for the sake of public decency that the investigation should take place in private, and as the Ecclesiastical Courts always exercised such a power in nullity suits, I conceive they must have had the same power in other cases where it was desirable from respect to public decency or morality that they should exercise it. In cases, therefore, in which it is not advisable to carry on the suit in open court, I shall order it to be heard in private. The next question is, whether in the exercise of my discretion, I should make such an order in this case. It is to be remembered, that if in the course of the investigation I should find that the matters involved in the case are not in fact of such a character as to render it necessary to continue the inquiry in private I may at once admit the public, and conduct the suit in the usual way. I think primâ facie it appears from the affidavits before me that it is highly probable that the facts in this suit ought not to be investigated in public. I shall therefore order that the inquiry shall commence with closed doors, but if it turns out that the circumstances are not offensive to public decency, I shall order them to be opened.

The Judge Ordinary subsequently refused to allow the case to be heard before a jury, but directed it should be heard before himself in camerâ. (1)

Attorneys for petitioner: *Denton, Hall, & Barker.*
Attorneys for respondent: *W. Gibson & Sons.*

(1) In fact, from February, 1860, when the case of *H. v. C.* was decided, until July, 1864, nullity cases were always *heard in open Court.* In the case of *Marshall* v. *Hamilton* (3 Sw. & Tr. 517) the evidence was of such an offensive character that Sir J. Wilde signified a desire that for the future they should be heard in camerâ, and with the consent of counsel ordered that they should be so.

BLAND *v.* BLAND. 1875
Feb. 16.

Matrimonial Suit—Respondent in Prison—Substituted Service—Practice.

If the respondent be in prison, the Court will not be satisfied with substituted service of the petition and citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to the respondent.

In this case Mrs. Mary Bland presented a petition for a dissolution of her marriage with John George Bland by reason of his adultery and cruelty, and prayed for the custody of two children, the issue of the marriage. A citation was taken out on the 27th day of January last, but in consequence of the respondent being confined in the convict prison of Portland Island, personal service could not be effected in the usual way. Application was, therefore, made to the governor of the prison for an appointment to enable a personal service to be effected, and he referred the applicant to the secretary of state to obtain an authorization to that effect. The secretary of state refused to grant permission for the personal service upon the convict of the petition and citation.

Searle moved the Court to substitute some other service in lieu of personal service. By rules 10 and 13 citations are to be served personally when that can be done; but in cases where personal service cannot be effected, application is to be made to the Judge Ordinary to substitute some other mode of service.

[The Judge Ordinary. What service do you propose in lieu of personal service?]

Searle would leave that to the Court to direct, but he thought that at any rate a copy of the citation and petition should be left with the governor of the gaol.

The Judge Ordinary. This is a question of some importance. A suitor ought not to be deprived of his remedy in this court by the fact that the defending party has been sentenced to a long term of imprisonment. This lady ought to have some means of

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prosecuting her suit; on the other hand, it is a principle from which it is impossible to depart, that where one party has instituted proceedings of this kind, the other should have knowledge of them and an opportunity to defend himself. The object of substituted service is to provide the best means under the circumstances for bringing to the knowledge of the accused party the fact of proceedings having been instituted against him, either when he is keeping out of the way or his whereabouts is not known. This case does not, however, come within either of these classes. The respondent is not wilfully keeping out of the way, and his whereabouts is perfectly well known. There is no information before me to satisfy me that if these documents were served upon the governor, they would come to the knowledge of the convict. As far as I know, it may not be customary to communicate such matter to the prisoners, and it does not necessarily follow that the service of them upon the governor or other official will bring the fact to the mind of the respondent that his wife has instituted proceedings against him. I therefore decline to make an order for substituted service at present, but it may turn out that although the prisoner cannot be personally served, the knowledge of the proceedings may be brought to him through some official. The petitioner must make further inquiries, and if I find that there are means by which such a matter can be brought to the notice of the respondent, I will act on the information. (1)

Attorneys: *Boulton & Sons.*

(1) The petition and citation were afterwards personally served on the respondent in the prison.

IN THE GOODS OF HOPKINS.

1875
March 16.

Administration—20 & 21 *Vict.*, *c.* 77, *s.* 73—*Applicant not directly Interested*—*Special Circumstances.*

A doubt having been raised as to the legitimacy of the sole next of kin, a deed was entered into by the parties interested for the distribution of the deceased's property amongst themselves in certain proportions, and it was a part of the arrangement that administration of the personal estate of the deceased should be applied for by an individual who had, under no circumstances, an interest therein :—

Held, that there were special circumstances in the case which authorized the Court to grant such administration to the person designated under 20 & 21 Vict. c. 77, s. 73.

MARIA HOPKINS, late of the Firs, Old Swinford, Worcestershire, died on the 14th of February, 1874, a spinster, and intestate, leaving Matilda Henry, wife of Thomas Henry, claiming to be her lawful niece, only next of kin, and the only person entitled in distribution to her personal estate. Mary Spearman, widow, Charlotte Sarah Hopkins, spinster, and Emma Hopkins, spinster, were the lawful cousins german of the deceased, and in case Mrs. Henry were not legitimate, her next of kin. A doubt having been raised as to the legitimacy of Mrs. Henry, a deed, bearing date the 6th of February, 1875, was executed by Thomas Henry and his wife Matilda, of the first part, by Mrs. Spearman, Miss Charlotte Sarah Hopkins, Miss Emma Hopkins, and the applicant, Miss Henrietta Sarah Hopkins, of the second part, and John Cooke, gentleman, of the third part, whereby certain arrangements were concluded for the division between Mrs. Henry and the other parties to the deed of the deceased's property, with a provision that administration of the personal estate of the deceased Maria Hopkins should be taken out forthwith by Henrietta Sarah Hopkins, or some other duly authorized person. On the 4th of February, 1875, a renunciation was executed by Mrs. Henry (which, however, was not signed by her husband), at Cleveland, Ohio, in the United States of America, where, with her husband, she resided, and a consent to the administration being granted to Miss Henrietta Sarah Hopkins. Mrs. Spearman, Miss Charlotte

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Sarah Hopkins, and Miss Emma Hopkins, are aged persons, infirm, incapable of transacting business, and unwilling to take upon themselves the administration of the deceased's effects, and desirous that such administration should be granted to the applicant. It appeared from the affidavit of Mr. Edward Westland Bernard, of Stourbridge, the solicitor for the applicant, that he, on the 9th of March, 1875, went to the residence of the old ladies and explained to them the nature of the application to be made to the Court in this matter, and read over and fully explained to them the contents of the document whereby it was intended that they should signify their consents to the grant being made to Miss Henrietta Sarah Hopkins, which they thereupon executed. The deceased's property consisted of shares in the Birmingham Canal Navigation Company, of 1391*l.* 3*s.* 3*d.* in the Stourbridge Branch of the Birmingham and Midland Bank, and of other effects. The whole estate was under the value of 7000*l.*

R. A. Pritchard moved the Court to grant administration under the 73rd section of the Probate Act to Miss Henrietta Sarah Hopkins accordingly. The next of kin is living abroad, and has renounced; and as regards the other persons interested, they have been fully made acquainted with their rights, and are desirous the grant shall be made to the applicant. [He referred to *In the Goods of Hannah Roberts* (1), *In the Goods of George Johnson* (2), *In the Goods of Pine* (3), *In the Goods of Richardson* (4), and *Teague and Ashdown* v. *Wharton.* (5)]

The COURT, after consideration, directed that the grant of administration should issue to the applicant.

Attorneys: *Gregory, Rowcliffe, & Co.*

(1) 1 Sw. & Tr. 64.
(2) 2 Sw. & Tr. 595.
(3) Law Rep. 1 P. & M. 388.
(4) Law Rep. 2 P. & M. 244.
(5) Law Rep. 2 P. & M. 360.

McCORD *v.* McCORD, OGLE, AND COXON.

1875
May 25.

*Suit for Dissolution of Marriage by the Husband—Petitioner guilty of a single Act of Adultery—Condonation—*20 & 21 *Vict. c.* 85, *s.* 31.

On one occasion subsequent to his marriage the petitioner had connection with a female with whom he had cohabited before marriage. The fact became known to the respondent shortly afterwards, and was by her forgiven, and her cohabitation with her husband was continued for some considerable time:—

Held, that the condonation by the respondent was not a fact to justify the Court in exercising its discretion in favour of the petitioner, and therefore it dismissed the petition.

WILLIAM McCORD, of Newcastle-upon-Tyne, a clerk in Her Majesty's customs, petitioned the Court to dissolve his marriage with his wife, Mary Jane McCord, by reason of her adultery with the co-respondents. The marriage was celebrated on the 16th of February, 1870, and the parties cohabited together until November, 1872, when the respondent left the house of the petitioner's mother, with whom they then resided, and joined a theatrical company, but the husband continued to support her. Adultery was alleged in the petition to have taken place between October, 1870, and February, 1873. The respondent did not appear, but both the co-respondents did, and filed answers, in which they denied the adultery alleged against them respectively, and pleaded condonation and connivance, and that they respectively did not know the respondent was a married woman when they visited her. They also made a counter charge against the petitioner that in April, May, and June, 1871, he had committed adultery with Janet Bunn. To this last charge the petitioner replied that it had been condoned by the respondent. The cause was heard before the Judge Ordinary without a jury. No evidence was offered of adultery with Ogle. That with Coxon was proved, but it was not shewn that he was aware at the time she was a married woman. As regards the adultery of the petitioner with Janet Bunn, it appeared that the petitioner had known Janet Bunn in 1867, an intimacy had sprung up between them, and the result was the birth of a child, still living and maintained by the petitioner. The intimacy had been broken off before his marriage

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with the respondent, but the fact that there had been one was made known to her before marriage. In 1871 Janet Bunn called at the petitioner's mother's house, where he then resided, to see him about money for the child. She called more than once, and put herself in the petitioner's way as much as she could. On one occasion in June, 1871, he had connection with her, but never saw her afterwards. The respondent having found a letter from Janet Bunn, pressed the petitioner as to having had an interview with her. In the presence of his mother he admitted the adultery, expressed his regret, and gave his word he would not see Janet Bunn again, which promise he kept. She forgave him, saying she believed the woman to have been more to blame than he was. She repeated this to other members of the family, and continued to cohabit with him on affectionate terms until November, 1872, and when she finally left she stated she did so because she had committed herself, but made no complaint of her husband's conduct.

April 28. *Inderwick, Q.C.*, and *Pritchard*, appeared for the petitioner.

Spinks, Q.C., H. Stokes, and the *Hon. C. H. Vivian*, for the co-respondents.

Inderwick, Q.C., submitted that in this case the Court would exercise its discretionary power in favour of the petitioner, and dissolve his marriage, notwithstanding the admitted fact of his adultery with Janet Bunn. It was a single act, and had been condoned. The parties had lived together on affectionate terms for some time afterwards, and the husband's conduct did not lead up to the adultery of the wife. [He referred to *Anichini* v. *Anichini* (1), *Joseph* v. *Joseph* (2), *Clarke* v. *Clarke* (3), *Latour* v. *Latour and Weston* (*The Queen's Proctor intervening*) (4), *Coleman* v. *Coleman* (5), and *Morgan* v. *Morgan and Porter*. (6)

Cur. adv. vult.

May 25. THE JUDGE ORDINARY. This was a suit by a husband for dissolution of his marriage with the respondent on the ground

(1) 2 Curt. 210.
(2) 34 L. J. (P. M. & A.) 96.
(3) 34 L. J. (P. M. & A.) 94.
(4) 2 Sw. & Tr. 524; S. C. (on appeal) 10 H. L. C. 685; 33 L. J. (P. M. & A.) 89. 10 Jur NS. 325
(5) Law Rep. 1 P. & M. 81.
(6) Law Rep. 1 P. & M. 644.

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of her adultery. The co-respondents pleaded, amongst other pleas, adultery committed by the petitioner. The petitioner at the trial admitted that he had committed adultery, but alleged that it had been condoned by the respondent. The respondent did not give evidence in denial of this allegation. The adultery of the respondent being proved, the question arising for consideration is whether the Court, in the exercise of the discretion conferred upon it by 20 & 21 Vict. c. 85, s. 31, should abstain from pronouncing a decree nisi dissolving the marriage. The parties were married on the 16th of February, 1870. The respondent was an actress, and continued to practise her profession after the marriage. The petitioner stated that he wished her to leave the stage, but that she wished to remain. In November, 1872, the respondent, on some slight quarrel, left the petitioner, and in the following January committed the adultery proved at the trial. The petitioner stated that before his marriage he had formed a connection with a young woman by whom he had had a child. That in June, 1871, he saw her for about the first time after his marriage. That she threw herself in his way as much as she could, and that on one occasion he committed adultery with her. That his wife discovered the fact from a letter she found written by the young woman to the petitioner, and that she forgave him on his promising not to see her any more, which promise he kept. It was urged on behalf of the petitioner that the Court should exercise its discretion in his favour on the grounds that the act was isolated, and that it had been condoned by the respondent, and that it in no way conduced to her guilt.

The instances in which the Court has pronounced a decree for dissolution of a marriage, notwithstanding the adultery of the petitioner, are very rare. I am only aware of two cases, that of *Joseph* v. *Joseph* (1), where the petitioner had committed what may be called innocent adultery, by marrying again in the mistaken belief that his wife was dead; and the case of *Coleman* v. *Coleman* (2), where it appeared to the Court that the petitioner had been compelled by her husband to prostitute herself. In *Morgan* v. *Porter* (3), Lord Penzance, after referring to those decisions

(1) 34 L. J. (P. M. & A.) 96. (2) Law Rep. 1 P. & M. 81.
(3) Law Rep. 1 P. & M. 646.

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as illustrating two classes of cases in which the discretion of the Court may be fitly exercised in favour of a petitioner adds, "It may also well be that an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent. This was much discussed in the Ecclesiastical Court in the case of *Anichini* v. *Anichini* (1), and it was pointed out that upon a contrary view, a sort of licence to commit adultery without punishment would be set up on one side by guilt on the other, however distant in point of time, or however completely forgiven and condoned. There appears to me to be great force in the observations of the learned judge in that case, and on a proper occasion it will be very fit to consider whether his views ought not to be adopted in applying the discretion vested in this Court by 20 & 21 Vict. c. 85, s. 31." While the views of the very learned judge who decided *Anichini* v. *Anichini* (1) must always be entitled to the highest respect, it is to be observed that this Court, in suits for dissolution of marriage, is not bound to act on the principles on which the ecclesiastical courts formerly acted, such suits being expressly excluded from the operation of 20 & 21 Vict. c. 85, s. 22. On the other hand, I am bound as far as possible to preserve uniformity in the decision of this Court, and to apply the principles my predecessors have established in the exercise of the novel jurisdiction created by the Act of 1857. Thus I adopt the reasoning of Lord Penzance in the case already cited of *Morgan* v. *Porter*. (2) In that case he says, "In cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of such case, more or less pardonable or capable of excuse."

The special circumstances urged in this case in mitigation of the petitioner's guilt are that the act of adultery was isolated, and that it had been condoned; but in the case of *Clarke* v. *Clarke* (3) a

(1) 2 Curt. 210.

(2) Law Rep. 1 P. & M. 646.

(3) 34 L. J. (P. M. & A.) 94.

single act of adultery committed by the petitioner after his wife had left him, as he supposed for ever, was held by Lord Penzance to be a sufficient ground for refusing a decree, even for the incestuous adultery of the wife. The adultery of the petitioner in that case had not been condoned, for it was not known to the respondent, but for the same reason it had not conduced to her guilt. In *Goode* v. *Hamson* (1) the Court refused a decree, although the adultery of the petitioner had been condoned. Thus it has been decided that neither the fact that the act of adultery was isolated nor that it had been forgiven will constitute such special circumstances as to justify the Court in departing from that which must be taken to be its rule, not to grant a divorce when the petitioner also has been guilty of adultery. I will not take upon myself to say that under no circumstances will those facts, when combined, warrant the Court in granting relief to a guilty petitioner, but I can see nothing in this case which should lead me to make this petitioner an exception to the rule. His wife belonged to a profession in which she was exposed to great temptations; within eighteen months of his marriage he was unfaithful to her, and I cannot think that his conduct was the more venial because adultery was committed with his former mistress. Though the respondent forgave him, it appears in the highest degree probable that his conduct tended to weaken her sense of the obligation of the marriage contract, and so conduced to her guilt. If I were to yield to the arguments addressed to me in this case in extenuation of the petitioner's behaviour I should give rise to the mischief of which Lord Penzance expressed his fear in *Morgan* v. *Porter*. (2) I should be acting on the loose and unfettered discretion which he properly denounces, and not upon any definite principle which would serve as a guide in other cases. Finding, therefore, that the petitioner has been guilty of adultery, and seeing no special circumstances on which I can base a decision that he has become rectus in curiâ, I come to the conclusion that this is a case in which I am not bound to grant a decree, and I must decline to do so.

Petition dismissed.

Attorney for petitioner: *E. Doyle.*

Proctor for co-respondents: *H. G. Stokes.*

(1) 30 L. J. (P. M. & A.) 105. (2) Law Rep. 1 P. & M. 644.

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May 25.

IN THE GOODS OF TREEBY.

*Will—Alteration—Memorandum at the Foot or End—*1 *Vict. c.* 26, *s.* 21.

The testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of such houses were struck through by a pen, and the deceased's signature, but not those of the witnesses, was placed near such alteration. At the end of the will a clause was interlined, by which testator bequeathed the same house to his trustees for the sole benefit of his wife. Under the signatures of the deceased and the witnesses at the termination of the will a memorandum was added to the effect that the above words were struck out for the benefit of testator's wife. This memorandum was signed by the deceased and attested by the witnesses:—

Held, that the memorandum referred to both alterations, the obliteration and interlineation, and that the will so altered should be admitted to probate.

THOMAS WRIGHT GARDNER TREEBY, of Westbourne Terrace Villa, Paddington, gentleman, died on the 8th of December, 1874. In 1856 a will was prepared, by his instructions, in the office of Messrs. Bicknell & Bicknell, Edgware Road, and a copy thereof was forwarded to him for his perusal. The testator never returned such draft copy for engrossment, but on the 3rd of November, 1861, executed the same in the presence of two witnesses. By the will he bequeathed nineteen leasehold houses, which he described, and other leasehold property, and the residue of his real and personal estate, to trustees for the benefit of his children, and he appointed his brother, John Wright Treeby, and his brother-in-law, William Gutteridge, executors and trustees. After the death of the testator, it was found that the description of one of the nineteen houses, No. 1, Westbourne Terrace Villas, and the coach-house and stable adjoining thereto, which had been written on the second page of the will, was struck through with a pen, and the testator had written his name above such alteration, and that on the last page of the will, just before the final clause, there had been interlined the words, "I bequeath to my trustees No. 1, Westbourne Terrace Villas, with coach-house and stables, for the sole benefit of my dear wife." After the signatures of the deceased and of the witnesses, appeared the words, "*In No.* 2 *page, No.* 1, *Westbourne Terrace, is struck out for the benefit of my dear wife.*" This memorandum was signed

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IN THE GOODS OF TREEBY.

by the testator, and attested by two witnesses. The only attesting witness to be found deposed to the due execution of the will and memorandum, but could not speak to the actual state of the will at the time of such execution.

April 20. *Searle* moved for probate of the will, as altered by the obliteration of the words in the second and the interlineation of the words in the last page. By 1 Vict. c. 26, s. 21, a will with the alteration, as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made at the foot, or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will. In this case the memorandum refers to both the obliteration and interlineation before mentioned.

Cur. adv. vult.

May 25. SIR J. HANNEN. In this case the testator, having by his will disposed of various properties, including a house described as No. 1, Westbourne Terrace Villas, and the coach-house and stables adjoining thereto, and having duly executed the same, afterwards re-executed it, adding these words, "In No. 2 page, No. 1, Westbourne Terrace, is struck out for the benefit of my dear wife." I was asked to allow the alteration which appears on the face of the will, on page 2, i. e. the striking out of the words "No. 1, Westbourne Terrace Villas, and the coach-house and stable adjoining," and also to allow certain words interlined in the last sheet, "I bequeath to my trustees No. 1, Westbourne Terrace Villas, with coach-house and stables, for the sole benefit of my dear wife," to be included in the probate. I am of opinion that these words are entitled to be admitted to proof. The reference in the memorandum, which there is no doubt was duly executed, to the house No. 1, Westbourne Terrace Villas, coupled with the words that the paragraph had been struck out for the benefit of testator's wife, is a sufficient reference to the clause inserted in the last sheet, and as, from the intrinsic evidence, it may be fairly inferred that the words of the clause were on the paper before the memorandum was executed, I admit it to probate.

Attorneys: *Bowker, Peake, & Bird.*

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May 25.

In the Goods of STEWART.

Will—Executor according to the Tenor of the Will—20 & 21 *Vict. c.* 77, *s.* 73.

Testatrix, by her will, appointed her daughter, who is under age, sole executor and universal intromitter with her moveable means and estate, and certain persons trustees for the daughter until she is of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The Court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the 73rd section of the Probate Act, by reason that the testatrix had not appointed by her will an executor competent to take probate thereof.

Isabella (Mowatt) Stewart, widow, died on the 14th of February, 1875, having duly executed a will bearing date the 7th of February, 1875, to the following effect: "I, Isabella (Mowatt) Stewart, residing in No. 9, Albert Terrace, North Shields, being desirous of settling the succession to my means and estate so as to prevent disputes after my decease, do therefore give, grant, assign, dispone, devise, legate, and bequeath to and in favour of Maggie Wight Stewart, my daughter, residing in North Shields, and her heirs and assigns, heritably and irredeemably, all and sundry lands and tenements, heritages, goods, gear, debts, and sums of money, and in general the whole estate, heritable and moveable, real and personal, which shall be belonging and owing to me at my decease, together with the whole rents, interests, dividends, profits, and produce thereof, and the writings, title deeds, vouchers, and instructions thereof. And I hereby nominate and appoint the said Maggie Wight Stewart to be my sole executor and universal intromitter with my moveable means and estate. But these presents are granted and shall be accepted by the said Maggie Wight Stewart, and the aforesaid lands and other heritages hereby conveyed are disponed with and under the burden of the payment of my whole just and lawful debts, and sick-bed and funeral charges, and of the payment of the following legacies, viz. (none). And I reserve my own life-rent, use, and enjoyment of the premises, and full power and authority to me at any time of my life, and even on death-bed, to cancel or alter these presents at pleasure. And I dispense with delivery hereof, and I consent to registration for

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preservation. I also appoint the Reverend David Tasker, minister of the Scotch Church, North Shields; Adam Traill, schoolmaster, Scotch Church Schools; and Thomas Foster, carver and gilder, No. 9, Albert Terrace, North Shields, as trustees for Maggie Wight Stewart till she is of legal age." Below was a writing duly executed, and dated February the 9th, 1875, as follows: "Should the above Maggie Wight Stewart die before coming of age, I then bequeath to the Ingham Infirmary, South Shields, the dwelling-house, 9, Albert Terrace, North Shields, or its value, if sold by the trustees. Of the money remaining, I bequeath, &c. The remainder, with jewellery and other goods (if any) to be left in the hands of the trustees, to be divided by them, as they think fit, among the educational and charitable institutions of the town and vicinity." Maggie Wight Stewart was born the 5th of December, 1866, and no guardian had been appointed for her, either by her father, who died the 1st of January, 1871, or by the Court of Chancery. Her next of kin are two aunts, residing and settled in Australia; and a paternal uncle, who went abroad some years ago, and had not since been heard of.

May 4. *Bayford* moved the Court to grant probate of these papers to the trustees, as being, under the circumstances, executors according to the tenor thereof; or, if it could not do that, to grant administration with the papers annexed to them under the 73rd section of the Probate Act, without citing the next of kin of the minor, limited until the minor was of age, and for her use and benefit. He referred to Wentworth's Office of Executor (ed. 1829), p. 20; 38 Geo. 3, c. 87, s. 6; *Grant* v. *Leslie.* (1)

Cur. adv. vult.

May 25. SIR J. HANNEN. This is a case in which a testatrix, by her will, drawn up by a person unacquainted with the forms of English law, left to her daughter her whole property, and appointed her sole executor and universal intromitter with her moveable means and estate, and certain persons trustees for her daughter until she is of legal age, with a proviso in a subsequent document that in case the daughter died before coming of age, the trustees should dispose of the property in a particular way. I was asked

(1) 3 Phillim. 116.

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to allow probate of the will and codicil to issue to the trustees as executors according to the tenor thereof, but I cannot do that. There is nothing in the fact that the daughter was under age to enable me to draw a conclusion that the testatrix intended these persons to act in any other capacity than as trustees. As, however, the testatrix has not appointed, by her will, any executor willing and competent to act, and the next of kin are in Australia, I think I may properly grant to the trustees, under 20 & 21 Vict. c. 77, s. 73, administration with the will and codicil annexed for the use and benefit of the daughter, and limited until she comes of age.

Attorneys: *Stibbard & Cronshey.*

May 25.

FISCHER AND OTHERS *v.* POPHAM; BRETTELL AND OTHERS INTERVENING.

Codicil—Execution—Acknowledgment of Signature.

Where there is no formal attestation clause to a testamentary paper, and no affirmative evidence that at the time of execution the deceased's name was on the paper, the mere production of it to witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased.

THE plaintiffs propounded as executors the last will and testament, with two codicils thereto, of Elizabeth Hogg, of Clewer Hill House, Windsor, widow, who died on the 20th of April, 1874, the said will bearing date the 20th of January, 1869, the first codicil the 6th of September, 1871, and the second codicil the 28th of May, 1873. On the death of the deceased it was found that the signatures of the deceased at the foot of the first, third, and last sheets of the will had been struck through with a pen, and a memorandum in her handwriting added on the last sheet, to the following effect: "I, Elizabeth Hogg, declare this will to be null and void, Clewer Hill House, May 28th, 1873." Below this and at the bottom of the sheet, were the words "[Turn over]," and on the back was written the second codicil. The first codicil was written on a separate paper. The signature of the deceased at the end of each sheet of this codicil had been crossed out, and a memorandum was

written under the last, "This will is null and void, Elizabeth Hogg." Neither this memorandum nor that at the end of the will was attested. The second codicil was to the following effect: "I particularly desire, in case I die before making another will, that my child pay out of her property 1000*l.* to my nephew, Henry Champerate Crespin, also in trust for his children 1000*l.*; to my nephew, A. A. Crespin, 1000*l.* Also in trust for herself or children 1000*l.* to my niece, Julia Maria Titren. These sums to be paid within six months, free of all legacy duty. To Gertrude Christie, my niece, one thousand pounds. Elizabeth Hogg, witness my hand this twenty eighth of May, *one thousand eight hundred and seventy three.* George Butler, Caroline Checksfield" (the words in italics were written at the side of the names of the witnesses). Mrs. Popham, the daughter of the deceased, pleaded that the will and first codicil were revoked by the second codicil, which she propounded as the only testamentary paper of the deceased. Fanny Brettell and Louisa Percival, legatees under the will, as interveners in the suit, pleaded that the second codicil was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26, and they propounded the will and first codicil. The case was heard before Sir J. Hannen, without a jury.

The attesting witnesses to the second codicil, George Butler and Caroline Checksfield, were examined. The former said, "My mistress, Mrs. Hogg, called me into the servant's hall to sign a paper. She asked me to do so. She did not sign it in my presence. I cannot positively say whether I saw her signature when I signed. There was writing on the paper. It was doubled back" (the witness showed how this was done cornerwise, so as to leave open part of the writing and the signature of the deceased). On cross-examination he said, "Mrs. Hogg and Caroline Checksfield were in the room before I went in. The corner of the paper was folded back three or four inches. Mrs. Hogg told us where to sign. I did not know what I had signed. She only asked me to sign a paper. Those were the only words she used. The whole affair only lasted about two minutes. There was no conversation of any kind. The word signature was never used. She only said, 'Will you put your name to this paper?' She said so to both of

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us. Mrs. Hogg had arranged the paper before I got into the room. I cannot swear whether deceased's signature was there."

Caroline Checksfield deposed. "I recollect signing a paper for Mrs. Hogg in the servant's hall. She came into the hall, bringing with her an inkstand, a pen, and a paper document. She asked me if I would put my name to a paper. George Butler was present at the time. She put the paper on the table. I saw writing, but cannot tell what it was. I put my name on the paper after George Butler. The paper was folded back. I cannot say for sure that I saw the name of Mrs. Hogg on the paper. I do not think the words, Witness my hand, &c., were there then. I believe the signature Elizabeth Hogg was there. I was not sure what the paper was. She said, 'Will you come and sign this paper?' She did not say that two witnesses were necessary. She called in Butler and myself both at once. I signed hurriedly, and without noticing what was on the paper. Mrs. Hogg was rather hasty in temper. I did afterwards say to some one, that I did wish I knew what I had been doing."

April 23. *Dr. Spinks, Q.C.*, and *Dr. Tristram*, for the executors.
Dr. Deane, Q.C., and *Searle*, for Mrs. Popham.
Inderwick, Q.C., and *Bayford*, for Mrs. Brettell & Mrs. Percival.
R. A. Pritchard for H. C. Crispin.
H. R. Hodson for A. A. Crispin.

On the question of the due execution of the second codicil the cases referred to were *Ilott* v. *Genge* (1), *Pearson* v. *Pearson* (2), *Inglesant* v. *Inglesant.* (3)

Cur. adv. vult.

May 25. SIR J. HANNEN. The testratrix, on the 20th of January, 1869, executed a will which had been prepared by her solicitor, and the same was duly attested by the solicitor and his clerk. On the 6th of September, 1871, she executed a codicil, also prepared by the solicitor and attested by him and his clerk. On the 28th of May, 1873, the deceased requested two of her servants to sign a paper for her, and pointed out where they

(1) 4 Moo. P. C. 265. (2) Law Rep. 2 P. & M. 451.
(3) Law Rep. 3 P. & M. 172.

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were to sign. Both the witnesses agree that the deceased did not write anything in their presence, and that she did not say that it was her will, or that it was her signature, or anything about witnessing her will or her signature. Both the witnesses also agree that there was some writing on the paper, and that it was to some extent folded, but they did not enable the court to judge to what extent or with what effect as to observing any writing on the paper. The witnesses further say, the one (George Butler),—"I cannot swear whether the signature was there;" the other (Caroline Checksfield), "I cannot say for sure that I saw the name of Mrs. Hogg on the paper when I signed." This latter witness, on cross-examination, said: "I believe that the signature of Elizabeth Hogg was there;" but added, "I could not feel quite sure about it, I should not like to swear." She also said, "There was not so much to be seen as now. I do not think the words 'witness my hand' were there then." The paper which these witnesses signed is written on the blank sheet of the will of the 20th of January, 1869. The signature of the testatrix to that will had been crossed through with a pen, and beneath it is written by the testatrix: "I, Elizabeth Hogg, declare this will to be null and void. Clewer Hill House, May 28th, 1873." At the bottom of the page, in the left-hand corner, are written between brackets "[turn over]." The codicil signed by the witnesses has not a complete attestation clause, but only the words, "Witness my hand this twenty-eighth of May, one thousand eight hundred and seventy-three." In these circumstances the question arises whether the evidence is sufficient that the signature of the testatrix was acknowledged by her in the presence of the witnesses. I am obliged to hold that it is not. The case only differs from *Ilott* v. *Genge* (1) in this, that it does not appear affirmatively that, if Mrs. Hogg's signature was on the paper when the witnesses signed, it was so folded that they could not see it; but there is an absence of proof that it was there, and the mere production of a paper with the request that the witnesses will sign it is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased. There is no formal attestation clause from which it could be inferred that the testatrix knew

(1) 4 Moo. P. C. 265.

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the necessary formalities, and therefore observed them. On the other hand, the mode in which the testatrix dealt with the will shews that she was ignorant on the subject, and, further, not only does the witness, Caroline Checksfield, say that she thinks that there was not so much written on the paper when she signed it as there is now, but, on inspecting the document, there appears strong reason to believe that at least the words one thousand eight hundred and seventy-three have been written in after the witnesses signed, thus raising a suspicion that the testatrix to that extent completed the document after the witnesses had written their names. She may have also added her signature. I therefore pronounce against the document of the 28th May, 1873, and as the will and the codicil of the 6th of September, 1871, have not been effectually revoked, I must pronounce in their favour.

Attorney for plaintiffs: *H. M. Phillips.*
Attorneys for defendant, Mrs. Popham: *Meynell & Pemberton.*
Attorney for Mrs. Brettell and Mrs. Percival: *F. C. D. Smythe.*
Attorneys for H. C. Crispin: *Tippetts, Son, & Tickle.*
Attorney for A. A. Crispin: *E. Lee.*

May 4.

IN THE GOODS OF HUNT.

Will—Prepared for another Person—Executed by Mistake—Probate.

The deceased, who resided with her sister, prepared two wills for their respective execution. The legacies in each, and the disposition of the residue were almost identical, and in either case a life interest was given to the survivor in the bulk of her sister's property. The deceased, in mistake, executed the will prepared for her sister.

The Court *held* that the deceased did not know and approve of the contents of the document she executed, and refused probate of it.

SARAH HUNT, of Heathrow, Harmondsworth, Middlesex, spinster, died on the 7th of December, 1874. For some years previous to her death she had lived with her sister, Miss Ann Hunt, at Heathrow; and at the close of the year 1873 the sisters agreed to make their respective wills; the principal object they had in view being that in the event of the death of either of them, the survivor should enjoy their joint property for life. Two wills were pre-

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pared in the handwriting of Miss Sarah Hunt. The one was to the following effect. "The last will and testament of me, Ann Hunt, of, &c. I give to my sisters, Mrs. Dalton and Mrs. Corney, each 200*l.* I give to my brothers, Samuel and Ebenezer, each 200*l.*; and to each of their children 19*l.* 19*s.* To my niece, Sarah Ann Pewtress, 200*l.* To my nephew Arthur in Australia, 150*l.*; and to my nephews James and Edward, each 100*l.* To Mr. Spurgeon's College, the Haverstock Hill Working Orphan School, and the Aged Pilgrims Society, each 19*l.* 19*s.* The residue, after the payment of my debts and funeral expenses, I leave to my sister Sarah for her life; at her death I give to my niece, Sarah Ann Pewtress, in addition to the forementioned legacy, 100*l.* To my nephew Josiah, 100*l.* The remainder to be divided equally between my nephews and nieces, the children of my brothers Samuel and Ebenezer, in addition to the forementioned legacies. The whole of the legacies to be paid free of duty. I give to my sister Sarah all the household furniture, plate, books, &c., which I now hold in part with her. I appoint my brother Samuel, and his son Frederick, my executors, and give to them 50*l.* for their trouble as my executors. Dated 2nd January, 1874." The other was identical, except that a legacy of 19*l.* 19*s.* was given to the Stockwell Orphanage instead of to the Haverstock Hill Working Orphan School, and the furniture and life interest in the residue to the sister Ann. After the death of Sarah Hunt, the two wills were found together, endorsed "The wills of Sarah and Ann Hunt," but on opening them it was discovered that each sister had executed the will prepared for the other. Most of the persons interested in an intestacy consented that the document executed by the deceased should be recognised as her will, and probate thereof be granted to the executors named in it, but some of such persons were abroad, and could not be communicated with.

Bayford moved for probate of the document as the will of the deceased. If the Court would grant the application, the wishes of the deceased can be carried out, because a Court of construction would receive evidence that the sister called Sarah in the paper was in fact named Ann. The mere fact that a wrong name is

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inserted at the commencement of the will will not vitiate it. [He cited an *Anonymous Case*, referred to in 14 Jur. p. 402; *In the Goods of Clark* (1); *In the Goods of Cosser*. (2)]

SIR J. HANNEN. I should be glad to give effect to the intentions of the testatrix, by granting probate of this instrument, if I could, but I must not allow myself to be led away from what appears to me to be very plain ground by such a desire. No doubt there has been an unfortunate blunder. The lady signed as her will something which in fact was not her will. If I were to attempt to read it as her will, it would lead to a variety of absurdities. She leaves to her sister Sarah, that is to herself, a life interest in a portion of her property, and all the furniture, plate, &c., which she holds in part with herself. I am asked to treat this as a misdescription. If by accident a wrong name had been introduced, and it was clear what person was intended, the Court would give effect to the instrument, providing the mistake could be corrected. But it would be contrary to truth in this case if I acted on such an assumption. If I were to put such a construction upon this will, I should be assuming, in order to do substantial justice, what everyone who hears me would know is contrary to the fact. And no Court ought to base its judgment on something wholly artificial, and contrary to what everyone must see is the real state of the circumstances. It is enough to say that there has been an unfortunate blunder. A paper has been signed as the lady's will, which, as it happens, if treated as her will, would to a great extent, although not entirely, carry out her wishes. But in one respect it does not, for by it a legacy is bequeathed to one charity which she intended to leave to another. As regards this legacy, it is suggested that it might be treated as if the deceased did not know and approve of that part of the will, but she did not in fact know and approve of any part of the contents of the paper as her will, for it is quite clear that if she had known of the contents she would not have signed it. I regret the blunder, but I cannot repair it. I reject the motion, but I allow the executors costs out of the estate.

Attorneys: *Gamlen & Son.*

(1) 2 Curt. 329. (2) 1 Robert. Ecc. 633.

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Will—Executors according to the Tenor thereof—Alterations dated prior to Execution of Will. *July* 27.

4 PD 85

In order to constitute one an executor according to the tenor of a will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and discharge the legacies contained in such will.

In the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will in the handwriting of the testator, such alterations will not be recognized by the Court or appear in the probate.

JOHN ADAMSON, originally a Scotchman but domiciled in England, died at Plymouth on the 25th of September, 1874. He left a will bearing date the 27th of November, 1873; also a deed of settlement dated the 22nd of April, 1864, executed according to the Scotch form, and intended to take effect after death. There were also found on his death several other unattested testamentary papers, dated respectively the 24th of November, 1873, the 20th of February, 1874, the 7th of July, 1874, and (by mistake) November, 1874, and one undated. These were all in the handwriting of the deceased.

June 22. *Dr. Spinks, Q.C.* (*Patchett* with him), moved for probate of the will and deed of settlement, as together containing the will of the deceased, to be granted to Mitchell Thompson, Charles Wall, and John A. Saunders, as executors according to the tenor of the will.

Cur. adv. vult.

July 27. SIR J. HANNEN. The testator in this case, John Adamson, by his will bearing date the 27th of November, 1873, gave, devised and bequeathed all his real and personal estate, and in particular his house No. 45, Torrington Place, unto and for the use of Mitchell Thompson, Charles Wall, and John A. Saunders, therein described, and the survivors of them accepting, upon trust that they should, after his death, sell the same, excepting such especial articles as he should leave therein, or might by any other

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writing under his hand, and the testator directed his trustees, that, having converted his whole real and personal estate into money, they should out of the readiest of his real or personal property pay his just debts and funeral expenses, those attending the trusts, and pay the balance or residue of his said means to his cousin Alexander Adamson, William John Fortune, and John, the son of his late brother David Adamson, trustees appointed for the management of his affairs in Scotland, and for the ultimate distribution of the free produce of his English estate by a deed executed by him on the 22nd of April, 1864. The deed of the 22nd of April, 1864, named as trustees Lawrence Adamson, David M. Adamson, and Alexander Adamson. There are several unattested additions to this deed in the testator's handwriting, all bearing dates prior to the will of the 27th of November, 1873. Some passages also are struck through with the pen, and opposite to these is written, "Cancelled. J. A." These words are also written opposite to another passage which is not struck through. A note is added in the margin, which is signed by the testator and dated the 17th of June, 1872. The unattested paper of the 24th of November, 1873, which was found attached to the deed of April, 1864, purports to make certain alterations in that deed, and states that Alexander Adamson and William John Fortune, the persons named in the will of the 27th of November, 1873, had kindly consented to act as his trustees in the sale and distribution of his estate in Scotland; and 10*l.* is left to each of them as acknowledgment. The first question which arises is whether Mitchell Thompson, Charles Wall, and John A. Saunders are to be regarded as mere trustees or as executors according to the tenor. I am of opinion that they are executors according to the tenor, though their power is limited to the testator's property in England. The essential duties of an executor are to collect the assets of the deceased, to pay his funeral expenses and debts, and to discharge the legacies. Of these three duties two are expressly assigned by the testator to Messrs. Thompson, Wall, and Saunders, for he directs them to pay his debts and funeral expenses, and to pay the balance to the Scotch trustees; and I think the reasonable construction of the language used by the testator is that the three persons named should also

collect his assets in England. If the language of the will which I have quoted stood alone, I should deem it highly improbable that the testator intended that some person as administrator should collect the assets and hand them over to the three persons named, but there is a passage in the will which makes it clear that the testator intended to appoint and thought that he had appointed executors, for he says, "each executor only accountable for his own intromissions." A meaning can only be given to this passage by holding that the three persons named are executors according to the tenor.

The next question is, which of the testamentary papers left by the deceased are to be admitted to probate. It is clear that the deed of settlement of the 22nd April, 1864, must be so admitted; for it is distinctly and correctly referred to and identified in this will as the instrument under which "the ultimate distribution of the free produce of his English estate" is to be made. It is equally clear that the several unattested papers bearing date subsequent to the will must be rejected. The unattested document of the 24th of November, 1873, must also be rejected, because it is not in any way referred to by the will, and therefore cannot be considered as incorporated in it. The question remains, whether the alterations in and additions to the deed bearing date prior to the will can be admitted. The testator, by the deed, purports to reserve to himself a power of making such special legacies as he may feel inclined to add, and directs his trustees to give full effect to any writing of that description which he may leave, however informal it may be. And he appears to have acted under the mistaken impression that he could legally reserve to himself such a power; but it has been long settled law that he could not do so: *Croker* v. *Marquis of Hertford* (1); Williams' Executors, 6th ed. p. 95. But the alterations, though originally inoperative, might be rendered valid by the subsequent execution of a duly attested will or codicil, incorporating the deed in its altered form. The general presumption is, that unattested alterations were made after the execution of the will, but this presumption may be rebutted by proof or internal evidence to the contrary. In the

(1) 4 Moo. P. C. 339.

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present case there is a total absence of evidence when the alterations and additions were made, unless the fact that dates prior to that of the will have been affixed to some of them by the testator is to be deemed such evidence. I have been unable to find any case in which it has been held that a date to an alteration was in itself sufficient to establish that it was made at that time. It is no doubt a general presumption that documents were made on the day they bear date: Taylor on Evidence, s. 137; but it may well be that the presumption does not exist with reference to alterations in a will though made by the testator himself, because the legislature in prescribing the conditions necessary for the due execution of testamentary papers intended to guard against certain innocent acts of testators as well as the fraudulent acts of others. The object of the statute 1 Vict. c. 26, is to obtain the security of the attestation of two witnesses to the fact that the testator has executed the whole instrument sought to be proved. If, in the absence of any proof that the alterations in a will were made before execution, beyond the fact that they bear an earlier date in the testator's handwriting, they were admitted to probate, the security of two witnesses would be wanting, and the mere statement of the testator would be acted upon. It has been held that declarations by a testator after execution of a will, that an alteration was made before are not admissible in evidence: *Doe* d. *Shallcross* v. *Palmer* (1); but if the date written by the testator be taken as sufficient, his declaration would be accepted without proof, whether it was made before or after the execution. It may be said that there is little probability of a testator affixing a false date to an alteration in his will, but my experience in this Court leads me to a different conclusion. That I am not alone in deeming it necessary to guard against such practices by testators is proved by the following passage in the judgment of the Privy Council in *Croker* v. *Marquis of Hertford* (2): "The want of specific identification would of necessity repeal, to a certain extent, the statute; for if a general reference would do, why should not a testator write as many codicils as he pleases after the incorporating codicil, and by omitting to date them, or by ante-dating them, defeat the provi-

(1) 16 Q. B. 747; 20 L. J. (Q.B.) 367. (2) 4 Moo. P. C. at p. 367.

sions of the statute?" For these reasons, I am of opinion that the probate should be granted of the will of the 27th of November, 1873, and of the deed of the 22nd of April, 1864, in its original form; and that all the alterations and additions and separate papers must be rejected.

Attorneys: *Pattison & Co.*

APPLEYARD *v.* APPLEYARD AND SMITH.

June 15.

Dissolution of Marriage—Personal Service of the Petition on Respondent—20 & 21 Vict. c. 85, s. 42.

Where every reasonable effort has been made to trace the respondent for the purpose of effecting a personal service of the citation and petition in a matrimonial suit, but without success, the Court will dispense with such personal service.

THIS was a petition for dissolution of marriage filed by William Appleyard against his wife, Agnes Campbell Appleyard, by reason of her adultery with the co-respondent. It was filed upon the 5th of November, 1874, and the citation and a copy of the petition was served upon the co-respondent on the 4th of December, 1874. It appeared, from the affidavit of the petitioner, that before marriage his wife had resided with her father (since deceased) and her stepmother at Glasgow, where the latter still lives. That he separated from the respondent in 1870, when she went to live at Leeds, and remained there until June, 1874. That he last saw her on the 19th of June, 1874, at Bradford. That since then he had made diligent inquiries as to her whereabouts, but that he could not trace her. William Sugden, formerly in the police force at Bradford, stated that in December, 1874, and in this year on several occasions he had been over to Leeds and Bradford to look after her. That he had searched and made inquiries at every place for lodging or resort at which she was likely to have been, but could obtain no clue as to her present whereabouts. In June, 1874, she had stolen a pair of boots at Leeds, and a charge of felony was entered against her at the police-office there, but the

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police had never seen or heard of her since, and it was believed she had left Leeds to avoid apprehension for felony. He had also made every inquiry at Glasgow and Liverpool. At the latter place, on the 9th of March, Mrs. Ross, her sister-in-law, informed him that she had seen respondent at her house in Liverpool in October last, and on the following day at Birkenhead; and that the respondent had then told her she was staying at the Royal Hotel, Birkenhead, but on inquiry no such person was known at the hotel. Neither the step-mother nor the sister-in-law know where she is now.

June 8. *Searle* moved the Court to dispense with personal service on the respondent.

THE JUDGE ORDINARY. I am very reluctant to make such an order. The result may possibly be to alter the status of the respondent without her having obtained any knowledge of the proceedings. In other Courts, in order to dispense with personal service, it must be shewn that the party is keeping out of the way in order to evade service of the writ itself; but in this case I should conclude that the respondent wishes to avoid apprehension on the charge of felony. I will look into the cases, and consider under what circumstances such an application should be granted.

Cur. adv. vult.

June 15. THE JUDGE ORDINARY. I took time to consider whether substituted service in the absence of the respondent could be allowed. I have several times expressed my anxiety lest, after I had ordered substituted service on a respondent, he or she should appear and state that no notice of the proceedings had been received and that there was a good defence. I find that a similar anxiety has been on the mind of a former judge of this Court (Sir C. Cresswell), who, however, held in *Peckover* v. *Peckover and Jolly* (1) that, under certain circumstances, it was impossible to require personal service. It would appear that every reasonable effort had in that case, as in this, been made to serve

(1) 1 Sw. & Tr. 219.

the citation, but in vain. In accordance with that decision, I will allow substituted service. The citation must be advertised, and a copy of it and of the petition must be left with the step-mother at Glasgow.

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Attorney: *Fluker.*

RONALDS *v.* RONALDS.

July 6.

Alimony pendente lite—Plea to the Jurisdiction.

The fact that there is a plea to the jurisdiction of the Court in a matrimonial suit does not affect the power of the Court to allot alimony pendente lite.

Where there was a substantial question of jurisdiction, and some months were to pass before it could be determined, the Court, in the exercise of its discretion, allotted alimony pendente lite.

THIS was a wife's petition for dissolution of marriage on the ground of adultery coupled with cruelty. The husband entered an appearance under protest, and filed an act on petition alleging that the Court had no jurisdiction, on the ground that he was not and never had been domiciled in England. An answer to the act on petition had been filed by the petitioner. She had also filed a petition for alimony.

(In chambers) *Pritchard,* for the husband, moved for an order to stay all further proceedings as to alimony until the question of jurisdiction should be determined.

Searle, for the wife, opposed the motion. The cause cannot come on for hearing until after the long vacation, and the wife is entitled to be supported in the interval.

THE JUDGE ORDINARY inquired whether there was a substantial question of jurisdiction to be determined.

Counsel on both sides agreed that there was. The husband at present resided in England, where he was served with the citation; and the main question would be, whether in fact he had acquired a domicile or permanent residence in England.

THE JUDGE ORDINARY. I have no doubt of the power of the Court to allot alimony pending the determination of a question of jurisdiction, but it is a matter of discretion whether it shall be

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allotted in any particular case. In this case, as it appears that there is a substantial question of domicile to be decided, and as it cannot be determined for several months, the wife is entitled to alimony. I therefore reject the application, and the proceedings for alimony must take the usual course.

Solicitors for petitioners: *Wontner & Sons.*
Solicitors for respondent: *Alsop & Co.*

Aug. 6.

GLADSTONE *v.* GLADSTONE.

Intervention of Queen's Proctor after Decree Nisi—Wife's Costs of Suit up to Date of Decree Nisi—Wife's Costs of Suit occasioned by Intervention—Particulars of Collusion and Suppression of Material Facts—Repetition by Queen's Proctor of Charges previously made by Respondent against Petitioner—Direction to the Jury as to the Mode of dealing with such repeated Charges, coupled with fresh Charges.

A wife who has obtained a decree nisi with costs is entitled to enforce payment of those costs from the husband, notwithstanding the intervention of the Queen's Proctor before the decree is made absolute.

After a wife had obtained a decree nisi the Queen's Proctor intervened and charged her with collusion, with the suppression of material facts, and with adultery, and those charges were denied by her. The Court declined to order the husband to deposit in the registry or to find security for the wife's costs of trying the issues raised by the Queen's Proctor's intervention.

When the Queen's Proctor charges collusion and the suppression of material facts, he is bound to furnish particulars of such charges.

In the answer to a petition by a wife for dissolution of marriage, the husband made a counter charge against her of adultery with A. Issue was joined, and after evidence on both sides had been produced, the jury found a verdict for the petitioner. The Queen's Proctor afterwards intervened, and charged the petitioner with collusion and with suppression of material facts, and with adultery with A. and with other men. The Court refused to strike out the charge of adultery with A., because the Queen's Proctor charged, and on the trial produced evidence of, other acts of adultery with A. besides those which had been charged by the respondent, and of which he had produced evidence. And the Judge Ordinary on the trial directed the jury that they must take into consideration, not only the additional evidence then produced, but also the evidence which had been produced on the former trial, in combination with such additional evidence, in determining whether the petitioner was guilty of adultery with A.

THIS was a petition by a wife for dissolution of marriage on the ground of adultery coupled with cruelty. The husband denied those charges, and made a counter-charge that the petitioner had

been guilty of adultery with Mr. Bridgford, and the cause was tried before the Judge Ordinary by a special jury in July and August, 1874, when a verdict was found for the petitioner on all issues, and a decree nisi with costs was pronounced. The Queen's Proctor afterwards intervened under the direction of the Attorney General and by leave of the Court, and alleged that the petitioner and respondent had been acting in collusion, that material facts had not been brought to the knowledge of the Court, and that the petitioner had been guilty of divers acts of adultery with Mr. Bridgford and with another person who was named, and with divers men unknown. Issue was joined on these allegations, and the cause was set down for trial before the Judge Ordinary by a special jury.

Inderwick, Q.C., for the respondent, moved that the order for the payment of the wife's costs should be suspended until after the issues had been tried, and the result of the Queen's Proctor's intervention was known.

Searle, for the petitioner, opposed the motion.

THE JUDGE ORDINARY. I have no doubt that the motion must be rejected, and that the petitioner is entitled to enforce the order which she has obtained for the payment of her costs. In the litigation between her and her husband she has been successful, and there is no reason for departing from the ordinary rule that she is entitled to all her costs of that litigation. Besides, it is not the petitioner herself, but her solicitor, who has conducted the litigation on her behalf to a successful issue, who is entitled to receive these costs from the husband, and it would be contrary to reason and justice to make the payment of costs due to him dependent upon the result of an inquiry into what must be presumed to be the new state of facts which has brought about the Queen's Proctor's intervention.

Motion rejected.

June 22 (in chambers). *Searle*, for the petitioner, moved for an order that the husband should deposit in the registry or find security for the wife's costs of the trial of the issues arising from the Queen's Proctor's intervention. The principle on which

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a wife without means of her own is held to be entitled to the estimated costs of bringing her cause on for hearing applies equally to a case in which she has established her primâ facie right to a decree, but is called upon to defend herself against charges which, if proved, would disentitle her to have that decree made absolute.

Inderwick, Q.C., for the respondent, opposed the motion, which, he said, was without precedent.

THE JUDGE ORDINARY, after taking time to consider, made no order.

April 21. *Hawkins, Q.C.* (*Searle* with him), for the petitioner, moved that the Queen's Proctor should be ordered to furnish particulars of the collusion, or that the charge should be struck out; and also that the allegations in the Queen's Proctor's plea, that the petitioner had committed adultery with Mr. Bridgford, should be struck out, on the ground that they were substantially the same allegations as those contained in the respondent's answer, which had already been investigated and determined by a jury.

Sir J. Holker, S.J. (*Dr. Spinks, Q.C.*, and *H. Cowie* with him), appeared to oppose the motion, but admitted that he could not resist the application for particulars of the collusion.

THE JUDGE ORDINARY. That being so, it is unnecessary to take up the time of the Court with any further argument; but I think it is necessary, for the guidance of all parties, that I should state the view which I take of this matter. The statute (23 & 24 Vict. c. 144) gives the power of intervention to any one of the public, and to the Queen's Proctor, upon two grounds, and two grounds only, namely, by reason of the decree having been obtained by collusion, and by reason of material facts not having been brought before the Court. But special provisions are made as to the course to be taken by the Queen's Proctor in cases of collusion. He is to obtain the direction of the Attorney General whether he shall put forward a case of collusion or not, and no doubt the statute further directs that he must also obtain the leave of the Court to intervene. But, in fact, the Court has never hitherto exercised any real control over interventions by the

Queen's Proctor under the direction of the Attorney General. It has been left to the Attorney General, as a great public functionary exercising quasi judicial powers, to act upon his own responsibility, and the Court has in no instance withheld leave to intervene when it has been applied for by his direction. But it is not to be forgotten that all that is done, is done by leave of the Court; and it is worthy of consideration whether for the future in some cases it may not be the duty of the Court either to withhold or to withdraw its leave to intervene, acting, in fact, as a Court of Appeal from the decision of the Attorney General, if it should consider that the Attorney General has taken a mistaken view of a particular case. In the present case the Attorney General has given his sanction to the charge of collusion being put forward by the Queen's Proctor. As far as I can form an opinion, no facts were withheld from the Court at the last trial by reason of anything like collusion between the petitioner and the respondent; but that is a matter on which the Attorney General and the Queen's Proctor may have other information than I have. Therefore, all that I can do at present is to direct the Queen's Proctor to furnish particulars of the collusion which he alleges. It will be for the Attorney General and those who act with him to consider what course he should take in the matter; but if I were exercising the functions of the Attorney General, I should not think it right to put forward a purely speculative plea of collusion which would have to be abandoned at the trial for want of evidence to support it. I think the plea is one which ought to be based on some information which leads the Attorney General to the conclusion that there is a case fit and proper to be submitted to the Court in support of the charge. Having said so much, I leave the matter with the utmost confidence to the consideration of the Attorney General.

With regard to the second part of the motion, the statute, as I have already pointed out, does not give to the Queen's Proctor any more than to any other individual a right to intervene on any grounds except collusion and suppression of material facts. It does not give him the right to intervene because he may suspect that the verdict on the issues previously tried was an improper one, or was contrary to the weight of evidence; and it

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appears to me that if the charges which the Queen's Proctor intends to prefer against the petitioner are the same as those which were determined by the jury at the last trial, he is not entitled to prefer them. He has no right, in my opinion, to obtain in an indirect manner a new trial of an issue which has already been tried and determined by a jury. But it is impossible for me beforehand to limit the right of the Queen's Proctor, on his own responsibility and that of the Attorney General, to put before the Court any new facts which may be considered material. A chain of evidence may have been laid before the jury on the first trial, consisting of a number of links, but one link in the chain, by accident or otherwise, may have been omitted, and the Queen's Proctor may have the opportunity of supplying that link, and he would be entitled to do so. That would be a material fact not brought before the Court, and in order to make the bearing of that fact intelligible, it may be absolutely necessary to go through the whole of the evidence again. I cannot, therefore, beforehand limit the right of the Queen's Proctor to lay material facts before the Court. I direct that the Queen's Proctor shall furnish particulars of the material facts which he alleges were not brought before the Court at the last trial. He is not, of course, bound to disclose the details of his case in the particulars, but he must state the nature of the case he proposes to establish. I should add that, according to my present view of the matter, if I should be of opinion that no primâ facie case is made out to justify the repetition by the Queen's Proctor of the charge already tried by reason of material facts relating to that charge not having been brought before the Court, I should at any stage of the cause interfere and strike out all allegations relating to that charge. My present order is, that the Queen's Proctor furnish particulars both of the collusion and of the material facts which have not yet been before the Court. That disposes of the motion for to-day.

The following particulars of the charge of collusion were thereupon delivered by the Queen's Proctor:—

"The collusion is by the parties withholding from the knowledge of the Court matters material to the due decision of the case."

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Particulars of the material facts were delivered as follows:— "The material facts alleged in the second paragraph of the plea as not having been brought to the knowledge of the Court, are the facts mentioned and referred to in the fifth, sixth, seventh, and eighth paragraphs respectively, and also the following." The paragraphs specified, and also the remaining particulars, contained the charges of adultery between the petitioner and Mr. Bridgford and others. Many of the allegations were repetitions of those which had been made in the answer and in the particulars of the respondents, but several fresh allegations were added.

May 26. *Hawkins, Q.C.* (*Searle* with him), moved that the allegations of collusion and of the adultery with Mr. Bridgford should be struck out of the Queen's Proctor's plea. Before allowing the inquiry as to Mr. Bridgford to be re-opened, the Court ought to be satisfied either that the Queen's Proctor has a bonâ fide case of collusion, or that he has substantially a fresh case to lay before the Court as to the Bridgford charges. The particulars which have been delivered shew that the Queen's Proctor does not suspect collusion, or expect to be able to prove it. The particulars also lead to the inference that the case of the Queen's Proctor as to the Bridgford charges will be substantially the same as that which was presented to the jury at the last trial.

[THE JUDGE ORDINARY. If the material facts alleged in the particulars of collusion to have been withheld from the Court are the facts named in the other pleas and the particulars, namely, the alleged adultery with Bridgford and others, it should be so stated in the particulars.]

Sir J. Holker, S.G. (*Dr. Spinks, Q.C.*, and *Cowie*, with him), consented to the amendment of the particulars of collusion suggested by the Court and opposed the motion.

THE JUDGE ORDINARY. The course which the Queen's Proctor has taken in this case is in accordance with what has hitherto been the practice of the Court. Hitherto this Court has granted leave to intervene as a matter of course when the application

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was made with the sanction of the Attorney General. I have already stated my view as to the mode in which the Attorney General ought to exercise the discretion given to him by the statute, and it is of course impossible for me at present to say whether that view has been adopted by the Attorney General or not; I must assume that this is a case in which the Attorney General is of opinion that he can properly sanction the Queen's Proctor's intervention. If I were to accede to the application made on behalf of the petitioner, I should in effect revoke the leave which the Court has granted to the Queen's Proctor to intervene, but I have no materials before me to justify me in taking such a course. All that I can do is to wait for the result of this case, and it may then become necessary to consider whether a different practice from that which has hitherto been followed should be adopted in reference to allowing the Queen's Proctor to intervene; whether leave should be granted in all cases where he is directed by the Attorney General to apply for it, or whether the Court should have before it the materials upon which he proposes to charge collusion before granting leave. These pleas must stand, the particulars of collusion by the withholding of material facts being amended as I have suggested, and the case must proceed to trial, but I shall take care that the jury are made fully aware of all the circumstances of the case, and of the nature of the investigation which has already been made, and of its result.

The particulars of the nature of the collusion were accordingly amended as follows:—"The collusion is by the parties withholding from the knowledge of the Court matters material to the due decision of the case, such matters being the material facts mentioned in the second paragraph of the Queen's Proctor's plea and the particulars delivered thereunder."

The cause came on for trial before the Judge Ordinary, by a special jury, on the 24th of July, 1875.

Hawkins, Q.C., *Inderwick, Q.C.*, and *Searle*, were for the petitioner.

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Sir J. Holker, S.G., Dr. Spinks, Q.C., and *H. Cowie*, were for the Queen's Proctor.

The short-hand writer's notes of the evidence of the witnesses examined on both sides at the last trial upon the issue of the petitioner's adultery with Mr. Bridgford were read by consent, and such of the witnesses as were required were produced for cross-examination.

Several additional witnesses were produced in support of the charges of adultery with Mr. Bridgford and with other persons; and the petitioner and several additional witnesses were produced to rebut those charges. At the close of the case, the charge of collusion was abandoned by the Solicitor General.

THE JUDGE ORDINARY, in summing up, explained to the jury that the Queen's Proctor had no right to have a new trial of an issue which had been already tried unless he could shew that on the first trial material facts had been withheld from the Court, and if no new facts had been laid before them in support of the charge of adultery with Mr. Bridgford, it would have been the duty of the Court not to allow the case as to that charge to proceed. With the view of placing the whole case fully before the jury, the Judge Ordinary read the short-hand writer's notes of his summing up on the previous trial as far as it related to the issue of the adultery of the petitioner with Mr. Bridgford, and continued as follows:—"You can now form an opinion for yourselves whether I did or did not fully lay before the jury on the last trial the evidence which weighed against Mrs. Gladstone.

"The jury having considered that evidence, came to the conclusion, without leaving the box, that the charges against her had not been established, and no application was made to me to grant a new trial upon the ground that that verdict was not justified by the evidence. Certainly, if such an application had been made to me the result would have been that I should have stated that I was not dissatisfied with the verdict which the jury had come to after due deliberation, and that the evidence justified them in

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forming the opinion they did; I therefore should not have thought of disturbing that verdict. I feel it my duty to add that certainly nothing has occurred since which has diminished my confidence in the justice of the verdict of the former jury upon the evidence that was laid before them.

"Now I have to deal with the additional evidence. I have already told you that if there were no new evidence it would be my duty to stop the case; but there is new evidence. Certainly it is very difficult to say what new evidence is sufficient to justify the re-opening of a case. That is a question upon which minds may differ, and I do not find fault with those who may come to a different conclusion upon it to that to which I might come. But an intervener has no right to call additional evidence to prove the same facts. What the law requires on the part of the intervener is, that he shall bring before the Court material facts which have not been brought before it on the first occasion; not that he is to call fresh witnesses to prove the same facts. That would of course be trying the case over again. There must be fresh facts introduced. Take an example. We have had a party of servants called who were collected together at a supper-table on a particular occasion, and they say they heard a noise in a room above, and one of them came to the conclusion that it was the noise of two people committing adultery on a sofa. That evidence having been laid before a jury, and the jury having come to the conclusion that it is not safe ground upon which to find a verdict of guilty, it would be absurd to call another of the same party to prove the same noise over again. The jury have already had that fact before them and have dealt with it. It is not a new fact, although a dozen additional witnesses should be called to prove it. On the other hand, any additional facts that are proved may be and must be taken in combination with the old facts. You cannot separate the new facts from the old. For instance, on the last trial the evidence was for the most part circumstantial. The jury were asked to draw an inference from it. But that evidence has now been abundantly superseded by evidence of actual criminality. There are cases in which it happens that if a witness had stood alone in the statement that adultery was committed at

a particular time and place the jury might not believe him, but when that evidence of adultery is led up to by evidence of acts of familiarity the jury is far more likely to believe it. You cannot separate the two sets of facts—they must be taken in combination. You have to exercise your judgment upon the issues submitted to you on the whole of the evidence. You are not bound by the judgment formed by the other jury, though you will probably consider that their verdict should be treated with the same respect that you would expect to have shewn for your own verdict, deliberately arrived at; but it is for you to exercise your own independent judgment. That is a difficult task; I have thought about it much; and the best guide I can give you is this—put yourselves in the position of the first jury, and say whether you think that if the new evidence which has now been given had been added to the evidence then given before them, it would have produced in your minds a conviction of guilt which the old evidence by itself failed to produce. That is the best guide which I can suggest to you." The Judge Ordinary then called the attention of the jury to the material parts of the additional evidence.

The jury found a verdict for the petitioner on all the issues, and an affidavit having been filed that no appearance had been entered in opposition to the decree other than the appearance of the Queen's Proctor, a decree absolute was pronounced.

Solicitor for petitioner: *E. Tyrrell Lewis.*
Solicitors for respondent: *Park Nelson, & Morgan.*
The Queen's Proctor.

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FREDERICK *v.* THE ATTORNEY GENERAL, AND FREDERICK, CITED TO SEE PROCEEDINGS.

Legitimacy Declaration—Evidence of Declarations—What constitutes lis mota—Costs.

The question in litigation was whether A., a man, and B., a woman, were lawfully married in 1773. A letter from C., one of their sons, to D., his uncle, the woman's brother, was put in evidence, in which C. wrote, "What I want to do is to establish my legitimacy," and "whether I have a right to the estate I know not;" D. being then in possession of an estate which had been devised to B. for life, and then to her issue lawfully begotten, and in default of such issue to D. A letter was also put in evidence, written by D. to E., the brother of A., informing him of C.'s claim, and adding, "with regard to myself, the estate in question I cannot give up, as it is entailed on my children":—

Held, that these letters written in 1800 constituted the beginning of a controversy upon the question of the validity of the marriage of A. and B., although no step was taken to litigate that question until 1873; and that all declarations by members of both families made subsequent to 1800 were post litem motam, and therefore inadmissible in evidence.

Quære, whether the Court has power to condemn in costs a person cited to see proceedings under the Legitimacy Declaration Act, 1858.

THE petitioner in this case was Captain Charles Edward Frederick, of Stamford House, Winchester, and he alleged in his petition that he was the lawful son of Edward Frederick, who was the lawful son of Charles Frederick by his wife Martha Frederick, formerly Martha Rigden, spinster; and he prayed for a decree under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) to that effect, and that he was a natural born subject of the Queen. The respondent, Vice-Admiral Charles Frederick, being cited to see proceedings, appeared and traversed those averments in the petition which set out a lawful marriage between Charles Frederick, the petitioner's grandfather, and Martha Rigden, and alleged that Charles Frederick, the grandfather, died without lawful issue. The Attorney General filed a formal traverse of the averments in the petition. The cause came on for trial before Sir James Hannen and a special jury in December, 1874.

Hawkins, Q.C., and *Dr. Tristram*, were for the petitioner.

Parry, Serjt., *Inderwick, Q.C.*, *Searle*, and *Lindsay*, were for the respondent.

Morgan Howard, Q.C., and *A. E. Hardy*, were for the Attorney General.

The only question in the case was whether or not there had been a lawful marriage between Charles Frederick and Martha Rigden. The petitioner alleged that there had been such a marriage in the month of March, 1773, at the parish church of Stalisfield, near Faversham, in the county of Kent; and in support of the averment he produced a great deal of evidence of reputation, consisting chiefly of letters written by Charles Frederick and his alleged wife, and by various members of the Frederick and Rigden families, recognizing them as husband and wife, and it was proved and admitted that they had openly cohabited in India (Charles Frederick being a distinguished officer in the East India Company's service) as husband and wife, and had been received in society from the year 1777 until Charles Frederick's death in 1791. It was also proved that Martha, after the death of Charles Frederick, had claimed and obtained from the East India Company a pension for herself and an allowance for her children as the lawful widow of Charles Frederick, and that her brother, John Rigden, had assisted her in making the claim. Martha died in 1794, leaving three sons by Charles Frederick surviving her, namely, Charles, who died without issue, Arnold, who died unmarried, and Edward, the father of the petitioner.

Parry, Serjt., in the course of the respondent's case tendered a deed dated the 26th of October, 1803, to which Sir John Frederick Edward Boscawen Frederick, the brother of Charles Frederick, was a party, and several other deeds of later date, to which members of the Frederick and Rigden families were parties, for the purpose of rebutting the evidence of reputation relied on by the petitioner, by means of recitals in the deeds to the effect that Charles Frederick had died unmarried or without lawful issue.

Hawkins, Q.C., objected to any evidence of declarations by the members of either family subsequent to the year 1800 being received, on the ground that they were made post litem motam.

The facts which were relied on as constituting a lis mota were these:—William Rigden, the great-uncle of Martha Rigden, died in 1776, leaving a will by which he devised certain real property

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to Martha Rigden for life, with remainder to her children lawfully begotten, and in default of such issue to her brother, John Rigden. The following letter from Charles Frederick, the eldest son of Charles Frederick and Martha Rigden, to this John Rigden, was put in evidence by the petitioner:—

"London, May 17th, 1800.

"Dear Uncle,—I yesterday received your favour, but am perfectly astonished at the way you have misconstrued my letter. Whether I have a right to the estate I know not, the will will best inform us. What I want to do is to establish my legitimacy, for were Sir John Frederick's children to die to-morrow, my uncle Edward would take the title and estate from me, my legitimacy not being perfectly established, which I cannot thoroughly do without your acknowledgment; for I am sure you will not so estrange yourself from brotherly affection as to come into a court of justice and swear your sister was a ——. And were the smallest property in the world to fall under these circumstances, my uncle Edward, through his very great relationship regard would cut me out of it; so that I am sure, for the good of the family and the affection you had for your late sister, you will help me to establish who I am. I beg the favour of an answer. The box of family papers belonging to my late honoured mother now in your possession (there being papers in them which my attorney cannot do without) I shall be obliged to you to send to me in the same condition that it was delivered over to you by my aunt. I have a better right. I am sure you will not refuse this, knowing I have a better right (and particularly at this time) to them than any human being in this world. We received the silver box safe. The day before yesterday I paid Mr. Hawkes, cap maker, 1 pound 16 shillings, which of course you will scratch out of the account against me. I shall be obliged to you to send me an acknowledgment for the twelve guineas. I am your sincerely obliged and affectionate nephew, C. F."

The following letter from John Rigden to Edward Boscawen Frederick, the brother of Charles Frederick, and the "uncle Edward" mentioned in the preceding letter, indorsed by Edward

Boscawen Frederick "Received 19th May, 1800," was also put in evidence by the petitioner:—

"Dear Edward,—I received a letter of explanation from Charles, announcing his intention of claiming the entailed estate of his late mother, which Mrs. R. answered by telling him that I should be ready to defend any action he might think proper to bring. This morning I received an answer, of which I send you a copy, in which I find you are brought forward. I wish to have your candid opinion, with what you design to do. With respect to myself, the estate in question I cannot give up, as it is entailed on my children. Its amount is short of a hundred pounds. If Charles gets his end it does not come to him only, but jointly, except the two eldest. I have expended more yearly on the family than the amount of the sum in question, and I now offered, on the loss of all their property, to pay 50*l.* a year till their schooling was finished. Did it concern myself only, I might be more easily induced to give it up, but for the sake of the rest of the family (not for Charles's sake), whom this affair will essentially injure, as the India Company will of course take off the annuity, and it will prevent all application for Lenox, and hinder Edward's promotion. This gives me great concern. This headstrong, obstinate young man does not care if he ruins them or not. Mrs. R. joins me in best respects to Mrs. Frederick and self.—I am, my dear sir, yours sincerely, John Rigden."

No step was taken for the purpose of determining the question whether there had been a lawful marriage until 1873, when Sir Richard Frederick, Bart., died without issue, and the question arose whether the petitioner or the respondent was entitled to succeed to the baronetcy, and the present suit was instituted. The respondent was the person on whom the title devolved if there was no valid marriage between Colonel Charles Frederick and Martha Rigden before the birth of the petitioner's father.

The following cases were cited upon the question of the admissibility of the declarations made subsequent to the year 1800: *Davies* v. *Lowndes* (1); *Shedden* v. *Attorney General* (2); *Berkeley*

(1) 6 Man. & G. 471.
(2) 2 Sw. & Tr. 170; 30 L. J. (P. M. & A.) 217.

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Peerage (1); Taylor on Evidence, 3rd ed. s. 563–4; *Butler* v. *Mountgarrett.* (2)

SIR J. HANNEN. I have no doubt that this evidence is not admissible. Looking at the substance of the matter, it is impossible to doubt that, when the letters which have been put in were written, a very serious controversy upon the question whether Colonel Charles had been lawfully married to Martha Rigden had arisen between different members of the family who had opposite interests in the decision of that question. We do not know the terms of John Rigden's letter to his nephew Charles, but it is easy to conjecture from the language of Charles's letter that his uncle had been remonstrating with him on his ingratitude in seeking to deprive him of the property in question after the kindness he had shewn to Charles and his mother. In that letter Charles says: "What I want to do is to establish my legitimacy, for were Sir John Frederick's children to die, my uncle Edward would take the title and estate from me." It is clear, therefore, that for the purpose of establishing his legitimacy he had made a claim to the estate of which John Rigden had taken possession. Can it be said that this was not a controversy between him and John Rigden? Independently of anything that John Rigden may have written directly to him, we find John Rigden writing thus to Edward Boscawen Frederick: "The estate in question I cannot give up, as it is entailed upon my children." Thus he distinctly announces his intention to resist any claim that Charles might make to this estate. It is quite clear that Charles's title to the estate depended upon the question whether his father and mother were lawfully married, and that is the exact question which we have now to determine. Further, John Rigden communicated the fact of this dispute having arisen between himself and his nephew to Edward Boscawen Frederick, who had the same interest as himself in the question of the marriage of Colonel Charles and Martha Rigden; for, as the nephew points out, if he were not legitimate his uncle Edward would take the title. It is clear that after this correspondence it would be the interest of Edward Boscawen Frederick to take the side adverse to his

(1) 4 Camp. at p. 418. (2) 7 H. L. C. 633.

nephew Charles upon the question whether Colonel Charles and Martha Rigden were lawfully married. I hold, therefore, that a controversy had arisen in the family as early as 1800 upon the very question at issue in this litigation, and that any declarations which Edward Boscawen Frederick may have made after that date, for the purpose perhaps of establishing his own title to the baronetcy at some future time, must be rejected.

Parry, Serjt., then tendered the deed, not as evidence of declarations, but as original evidence of an act done by the parties.

SIR J. HANNEN. I must reject this evidence. After having held that a statement in a deed by a member of the family is inadmissible because it was made in his own interest after a controversy had arisen, it would, I think, be absurd to admit the deed as evidence that he had acted on that statement.

The deeds were accordingly rejected, as was also evidence which was tendered of verbal declarations by members of the two families made subsequent to 1800.

Evidence of declarations, made by a deceased member of the Frederick family since 1800, of statements which she had heard made by members of the family previous to 1800, was also rejected.

A deed, dated the 19th of May, 1826, to which John Rigden was a party, shewing that the property which William Rigden had devised to Martha for life, and then to her children lawfully begotten, and in default of such issue to John Rigden, had been dealt with ever since Martha Rigden's death on the assumption that she had died without lawful issue, was tendered on behalf of the respondent and objected to.

SIR J. HANNEN admitted the deed for the purpose of shewing as a fact the way in which the property had been dealt with.

The jury, in the result, found a verdict for the petitioner on all issues, and the Court made a decree as prayed in the petition.

Hawkins, Q.C., asked that the respondent, Vice-Admiral Frederick, might be condemned in costs.

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Parry, Serjt. The 5th section of 21 & 22 Vict. c. 93 only gives the Court power to award costs to the person cited. The Court has no power to condemn the person cited in costs.

The motion was abandoned.

Solicitors for petitioner: *Loughborough & Son.*
Solicitor for respondent to see proceedings: *W. H. Dunster.*
Solicitor for the Attorney General: *E. L. Rowcliffe.*

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ALIMONY—*Pendente Lite—Matrimonial Suit—Allowance under Separation Deed.*] Under a deed of separation executed by the parties many years previously, the husband had covenanted to pay an annuity to his wife in accordance with the amount of his income at that period, which annuity he had continued to pay up to the present time. He subsequently acquired a very large increase of fortune, and finally instituted a suit in this Court to dissolve his marriage by reason of the adultery of his wife:—*Held*, that the wife had no claim to alimony pending suit estimated on the present income of her husband. Powell *v.* Powell - - - - - 55

2. —— *Pendente Lite—Allowance under Separation Deed.*] When a husband and wife at the time of the institution of a matrimonial suit are living apart under a deed of separation by which an allowance is secured to the wife, the mere fact of the institution of the suit does not entitle the wife to an increased allowance by way of alimony pendente lite estimated on the husband's present income. Powell *v.* Powell 186

3. —— *Pendente Lite—Plea to the Jurisdiction.*] The fact that there is a plea to the jurisdiction of the Court in a matrimonial suit does not affect the power of the Court to allot alimony pendente lite.—Where there was a substantial question of jurisdiction, and some months were to pass before it could be determined, the Court, in the exercise of its discretion, allotted alimony pendente lite. Ronalds *v.* Ronalds - - 259

ALTERATION IN WILL—*Memorandum at the Foot or End—1 Vict. c. 26, s. 21.*] The testator in the beginning of his will disposed of certain leasehold houses in trust for the benefit of his children. The words of the description of one of such houses were struck through by a pen, and the deceased's signature, but not those of the witnesses, was placed near such alteration. At the end of the will a clause was interlined, by which testator bequeathed the same house to his trustees for the sole benefit of his wife. Under the signatures of the deceased and the witnesses at the termination of the will a memorandum was added to the effect that the above words were struck out for the benefit of testator's wife. This memorandum was signed by the deceased and attested by the witnesses:—*Held*, that the memorandum referred to both alterations, the obliteration and interlineation, and that the will so altered should be admitted to probate. In the Goods of Treeby [242

—— Soldier on service - - - 204
See Will of Soldier.

—— Date of - - - - - 253
See Executor according to the Tenor. 3.

APPOINTMENT OF NEW TRUSTEES—Variation of Settlement - - - 226
See Settlement by Divorce Court.

ATTESTATION—Will - - 92, 164, 166, 169
See Execution of Will. 4, 5, 8, 11.

BARONETCY—Legitimacy declaration - 196
See Legitimacy Declaration.

CHARGING ORDER — *Matrimonial Suit—Co-respondent condemned in Costs—Charging Order on Money in Funds—1 & 2 Vict. c. 110.*] The 20 & 21 Vict. c. 85, s. 52, does not transfer to the Court for Divorce the powers of the Court of Chancery, which are ancillary to the enforcement of its decrees, but only those ordinary powers which are necessary for the direct enforcement of them, such as writs of execution and process in contempt. Hence, the power given to the Court of Chancery by 1 & 2 Vict. c. 110, ss. 14 and 18, on the application of a judgment creditor to make a charging order on stock standing in the name of, or beneficially belonging to, the judgment debtor, cannot be exercised by the judge of the Court for Divorce. Clarke *v.* Clarke - - - - 57

CITATION—Service - - - - 257
See Service of Citation.

CITATION TO BRING IN PROBATE—Estoppel
See Estoppel by Judgment. [7

CODICIL—Will—Confirmation - - 42
See Revocation of Will. 2.

—— Will—Revival - - - - 35
See Revival of Will.

CODICIL ABROAD—Will in England - 110
See Probate of Part of Will.

COLLUSION—Queen's Proctor—Particulars 260
See Costs of Wife. 2.

COMPROMISE OF TESTAMENTARY SUIT—*Defendants' Costs included—Taxation.*] In a testamentary suit a compromise was effected, which included a fixed sum to be paid to the defendants' attorney for his agreed costs. This sum was paid to him:—*Held*, that the Court could not afterwards order his bill to be taxed on the application of his client. Holditch *v.* Carter - 115

CONDONATION—Adultery of petitioner - 237
See Misconduct of Petitioner.

CONFIRMATION OF WILL - - - 42
See Revocation of Will. 2.

CONVICTION OF WITNESS FOR PERJURY—*Testamentary Suit—Verdict—New Trial refused—Material Witness convicted of Perjury—Second Application for New Trial—Practice.*] In a testamentary suit, the jury, being unable to agree, were discharged without giving a verdict. The question in dispute, the capacity of the deceased, was afterwards referred to a second jury, who found in the affirmative and for the plaintiff. Application was made for a new trial on the ground of the verdict being against the weight of evidence, but it was refused. Subsequently the plaintiff was convicted of perjury in reference to the evidence he gave in this Court in the above suit.—*Held*, that that circumstance was not in itself sufficient to justify the Court in allowing a new trial after an application with that object had been rejected. Davies *v.* Brecknell - 88

COSTS—Divorce Court—Charging order - 57
See Charging Order.

—— Divorce Court—Wife's costs - - 52
See Costs in Divorce Suit.

—— Executor—Practice - - - 64
See Testamentary Capacity.

—— Executor—Priority - - - 90
See Costs in Testamentary Suit. 3.

—— Intervention of Queen's Proctor - - 260
See Costs of Wife. 2.

—— Legitimacy—Declaration - - 270
See Declaration by Member of Family.

—— Matrimonial Suit—Wife's costs - 132
See Costs of Wife.

—— Next of kin - - - - 179
See Costs against Next of Kin.

—— Testamentary suit - - 23, 28, 90
See Costs in Testamentary Suit. 1, 2, 3.

—— Testamentary suit—Compromise - 115
See Compromise of Testamentary Suit.

—— Testamentary Suit—Estate - - 141
See Costs out of Estate.

COSTS AGAINST NEXT OF KIN—*Testamentary Suit—Rule* 41 (*Rules and Orders*, 1862)—*Notice—Condemnation in Costs.*] Under special circumstances the Court will condemn a next of kin in costs of suit, notwithstanding he may have, under rule 41 (Rules and Orders, 1862), given notice with his pleas that he merely insisted on the will being proved in solemn form, and that he intended only to cross-examine the witnesses produced in support of the will. Beale *v.* Beale - 179

COSTS IN DIVORCE SUIT—*Costs of Wife—Stay of Proceedings until Payment.*] The respondent having obtained an order upon the petitioner to pay to her or her attorney a certain amount of taxed costs, endeavoured to enforce such order by a writ of fi. fa., but failed in recovering them. The Court ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by the petitioner, but would not extend the order to the expenses incurred in the suing out and execution of the writ of fi. fa. Keane *v.* Keane - - - - - - - 52

COSTS IN TESTAMENTARY SUIT—*Costs out of Estate—Unsuccessful Opposition to Will—Pleas of Undue Influence and Fraud.*] The Court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified those pleas. Orton *v.* Smith [23

2. —— *Costs out of Estate—Unsuccessful Opposition to Will.*] The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits, and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity.—In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a bonâ fide belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs. Davies *v.* Gregory - - - - - - 28

3. —— *Costs out of Estate — Executor's Costs to have Priority — Insufficient Personalty.*] The Court, in a testamentary suit, having made an order that the costs of all parties should be paid out of the estate, with a priority to the costs of the executor, who was universal legatee of the personal and devisee of the real estate, refused to vary such order, so as to make the costs a charge upon the real estate, in case the personalty were insufficient. Davies *v.* Reynolds - - 90

COSTS OF WIFE—*Unsuccessful Suit.*] The Court has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, although security for such costs has been deposited in the registry by the husband, but it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground. Flower *v.* Flower - 132

2. —— *Intervention of Queen's Proctor after Decree Nisi—Wife's Costs of Suit up to Date of Decree Nisi—Wife's Costs of Suit occasioned by Intervention—Particulars of Collusion and Suppression of Material Facts—Repetition by Queen's Proctor of Charges previously made by Respondent against Petitioner—Direction to the Jury as to the Mode of dealing with such repeated Charges, coupled with fresh Charges.*] A wife who has obtained a decree nisi with costs is entitled to enforce payment of those costs from the husband, notwithstanding the intervention of the Queen's

COSTS OF WIFE—*continued.*

Proctor before the decree is made absolute.—After a wife had obtained a decree nisi the Queen's Proctor intervened and charged her with collusion, with the suppression of material facts, and with adultery, and those charges were denied by her. The Court declined to order the husband to deposit in the registry or to find security for the wife's costs of trying the issues raised by the Queen's Proctor's intervention.—When the Queen's Proctor charges collusion and the suppression of material facts, he is bound to furnish particulars of such charges—In the answer to a petition by a wife for dissolution of marriage, the husband made a counter charge against her of adultery with A. Issue was joined, and after evidence on both sides had been produced, the jury found a verdict for the petitioner. The Queen's Proctor afterwards intervened, and charged the petitioner with collusion and with suppression of material facts, and with adultery with A. and with other men. The Court refused to strike out the charge of adultery with A., because the Queen's Proctor charged, and on the trial produced evidence of, other acts of adultery with A. besides those which had been charged by the respondent, and of which he had produced evidence. And the Judge Ordinary on the trial directed the jury that they must take into consideration, not only the additional evidence then produced, but also the evidence which had been produced on the former trial, in combination with such additional evidence, in determining whether the petitioner was guilty of adultery with A. Gladstone *v.* Gladstone 260

—— Divorce suit - - - - 52
See Costs in Divorce Suit.

—— *Testamentary Suit—Married Woman's Will—Separate Estate not liable to such a Charge.*] A married woman, having a power of appointment over certain funds, executed the same by will in favour of her husband. The funds were handed over to the husband in the lifetime of his wife, and by him transferred to the trustees of a settlement made in anticipation of the marriage of his adopted daughter. The husband survived his wife but did not prove her will, and died possessed of property of only nominal value. Subsequently his representative propounded the will of the married woman, and was opposed by her next of kin. A copy of it was pronounced for, and the costs of the next of kin ordered to be paid out of the deceased's estate:—*Held*, that there was no property out of which such costs could be paid. Adamson *v.* Hammond - - - 141

COSTS OUT OF ESTATE - - 23, 28, 90
See Costs in Testamentary Suit. 1, 2, 3.

CROSS-EXAMINATION—Adultery - - 198
See Cross-examination as to Adultery.

CROSS-EXAMINATION AS TO ADULTERY—*Evidence*—32 & 33 *Vict. c.* 68.] A party to a cause, who is produced as a witness on his own behalf, and in his examination-in-chief denies the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, is liable to be asked, and is bound to answer, questions in cross-examination respecting all the charges contained in the pleadings. Brown *v.* Brown - - - - - 198

CRUELTY—Judicial separation—Administration
See Administration to Widow. [50

—— Subsequent separation deed - - 202
See Separation Deed.

CRUELTY OF HUSBAND—*Judicial Separation—Adultery of Wife.*] The Court refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the Court:—*Quære*, whether the Court can in any case grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery. Grossi *v.* Grossi - - - - - 118

2. —— *Suit for Dissolution of Marriage—Cruelty and Adultery—Previous Suit for Judicial Separation on the Ground of Adultery—Judicial Separation granted.*] A woman, who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the cohabitation. Green *v.* Green - - - - - 121

CUSTODY OF CHILDREN—*Judicial Separation decreed—Intervention of Grandfather*—20 & 21 *Vict. c.* 85, *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4.] After a decree of judicial separation in favour of the party in whose custody children of the marriage have been placed, the Court may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody. Godrich *v.* Godrich - - - - 134

DECLARATION—Practice - - - 149
See Petition.

DECLARATION OF MEMBER OF FAMILY—*Legitimacy Declaration—Evidence of Declarations—What constitutes lis mota—Costs.*] The question in litigation was whether A., a man, and B., a woman, were lawfully married in 1773. A letter from C., one of their sons, to D., his uncle, the woman's brother, was put in evidence, in which C. wrote, "What I want to do is to establish my legitimacy" and "whether I have a right to the estate I know not:" D. being then in possession of an estate which had been devised to B. for life, and then to her issue lawfully begotten, and in default of such issue to D. A letter was also put in evidence, written by D. to E., the brother of L., informing him of C.'s claim, and adding, "with regard to myself, the estate in question I cannot give up, as it is entailed on my children":—*Held*, that these letters written in 1800 constituted the beginning of a controversy upon the question of the validity of the marriage of A. and B., although no step was taken to litigate that question until 1873; and that all declarations by members of both families made subsequent to 1800 were post litem motam, and therefore inadmissible in evidence.—*Quære*, whether the Court has power to condemn in costs a person cited to see proceedings under the Legitimacy Declaration Act, 1858. Frederick *v.* The Attorney General - 270

DECREE ABSOLUTE—Time - - 200
See Nullity of Marriage. 2.

DECREE NISI—Time - - - 200
See Nullity of Marriage. 2.

—— Variation of - - - - 136
See Variation of Decree.

DEED OF SEPARATION—Alimony pendente lite - - - - - 55
See Alimony. 1.

—— Allowance - - - - 186
See Alimony. 2.

DELAY—*Dissolution—Unreasonable Delay—Dismissal of Petition.*] A husband discovered his wife in adultery in September, 1859, and separated from her, but did not present a petition for the dissolution of his marriage till July, 1873. He was a coal hauler, and admitted that, at the time when the petition was presented, he had stock-in-trade of the value of about 600*l.* and nine horses, besides some cottages which he had purchased through a building society. The Court refused to accept want of means as a sufficient explanation of the time which he had allowed to elapse before taking proceedings, and dismissed the petition on the ground of unreasonable delay. Short *v.* Short - - - - - - 193

2. *Dissolution of Marriage—Unreasonable Delay—Two Years—*20 *&* 21 *Vict. c.* 75, *s.* 31.] If a petitioner, with a full knowledge of the facts of the case, does not present his petition for two years, he must give some sufficient reason for the delay, otherwise his petition may be dismissed under 20 & 21 Vict. c. 75, s. 31. Nicholson *v.* Nicholson - - - - - 53

DELUSIONS—Testamentary capacity - 64
See Testamentary Capacity.

DEPENDENT RELATIVE REVOCATION 80, 89, [94, 211
See Revocation of Will. 3, 4, 5, 9.

DESERTION BY HUSBAND—A husband having committed several thefts, separated from his wife with her knowledge and consent, for the purpose of avoiding arrest. He was afterwards arrested and imprisoned, and having committed other thefts after his release, he was on subsequent occasions again imprisoned. Whilst he was in prison, and also in the intervals between his imprisonments, he kept up a correspondence with his wife and made repeated endeavours to induce her to return to cohabitation. She refused, and the cohabitation was never resumed. The wife having presented a petition for dissolution on the ground of adultery coupled with desertion, the Court held that there was no desertion, the separation being involuntary on the part of the husband. Townsend *v.* Townsend - - - - - 129

2. —— *Separation before Adultery complained of—Reasonable Excuse for Separation—Non-consummation of Marriage.*] A husband petitioning for a dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The respondent did not deny the fact of non-consummation, but alleged that the petitioner was to blame for it owing to his physical incapacity. The Court, without deciding the question of fact whether the non-consummation was the fault of the petitioner or of the respondent, came to the conclusion that the petitioner had acted under a bonâ belief that the respondent had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution on the ground of the respondent's adultery. Ousey *v.* Ousey and Atkinson - - - - - 223

DESTRUCTION OF WILL - - - 37
See Revocation of Will. 1.

DISSOLUTION OF MARRIAGE—Adultery—Previous separation - - - 223
See Desertion by Husband. 2.

—— Adultery of petitioner - - - 237
See Misconduct of Petitioner.

—— Citation—Service - - - 257
See Service of Citation.

—— Cruelty and adultery - - - 121
See Cruelty of Husband. 2.

—— Decree—Variation - - - 136
See Variation of Decree.

—— Delay - - - - - 84
See Delay.

—— Delay in petition - - - 193
See Delay.

—— Desertion - - - 129, 223
See Desertion by Husband. 1, 2.

—— Variation of settlement - - 226
See Settlement by Divorce Court.

DIVORCE—Unreasonable delay - - 84
See Delay.

DIVORCE COURT JURISDICTION—Charging order - - - - 57
See Charging Order.

DOMICIL—Will of foreigner - - 4
See Will of Foreigner.

ERASURE—Will—Parol evidence - - 21
See Evidence to explain Will.

—— Will—Revocation - - - 94
See Revocation of Will. 5.

ESTOPPEL—Judgment—Will - - 7
See Estoppel by Judgment.

ESTOPPEL BY JUDGMENT—*Citation to bring in Probate—Previous Caveat withdrawn before having been warned—No previous contentious Proceedings.*] A will of the deceased having been found in which A. was named executor, he gave notice thereof to B., who was about to obtain a grant in the goods of the deceased as interested under a previous will, and entered a caveat. Before the caveat had been warned, and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to B. that he did not intend to seek to establish his will, and administration, with the earlier will annexed, issued to B. Subsequently A. took out a citation calling upon B. to bring in the administration and shew cause why it should not be revoked:—*Held*, that

ESTOPPEL BY JUDGMENT—*continued.*
A. was not precluded from continuing a suit to determine which was the last will of the deceased. Goddard *v.* Smith - - - - - 7
EVIDENCE—Cross-examination—Adultery 198
See Cross-examination as to Adultery.
—— Examination de bene esse - - 181
See Examination de bene esse.
—— Parol—Will - - - - - 11
See Omission in Probate.
—— Pedigree—Family declarations - 270
See Declaration of Member of Family.
—— Will—Executor - - - 21
See Evidence to explain Will.
—— Will—Intention to revoke - - 105
See Lost Will.

EVIDENCE TO EXPLAIN WILL—*Will—Appointment of Executor on an Erasure—Declaration of Testator—Subsequent Codicil.*] The deceased executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The Court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor. In the Goods of Sykes - - - - - - - 26

EXAMINATION DE BENE ESSE—*Testamentary Suit—Examination of Witness de bene esse—Insufficient Grounds.*] In order to found an application for the immediate examination of a witness in a pending suit, the affidavit must set out special circumstances; it is not sufficient that it states that the witness is a material witness. Andrew *v.* Brooke - - - - - 181

EXECUTION OF WILL—*Acknowledgment of Mark.*] The evidence of one attesting witness (the other being dead) proved that he was called into the room of the deceased, and asked by a third party, who had the will in his hand at the time, to witness the signature of the deceased. A mark or cross was then on the paper at the foot of the will. The witnesses signed their names. The deceased was present, and within hearing, but did not make any observation, and the will was not read to or by him in the presence of the witnesses. The writer of the will, who had asked the witnesses to sign their names, was not called, and no proof was offered of his death:—*Held*, that the evidence failed to prove that the deceased acknowledged his signature in the presence of witnesses. Morritt *v.* Douglas - - 1

2. —— *Acknowledgment of Signature.*] The deceased signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. The will was lying on the table open, and headed in large characters with the words, "This is the last will and testament of," &c. It also had a full and formal attestation clause:—*Held*, that the deceased acknowledged her signature in the presence of two witnesses. Inglesant *v.* Inglesant - 172

EXECUTION OF WILL—*continued.*

3. —— *Attestation—Witness's Signatures not on the last Sheet.*] The deceased signed his name at the end of his will, on the tenth sheet, and placed his initials on the first nine sheets. Two out of three witnesses signed their names on the first nine sheets, but not on the tenth:—*Held*, that the operative signature of the deceased was not duly attested, and the execution was incomplete. Phipps *v.* Hale - - - 166

4. —— *Attestation and Subscription.*] The deceased executed his will in the presence of two witnesses, one of whom also made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and the witness opposite their respective marks and also the word witness, but he did not subscribe his own name:—*Held*, that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid. In the Goods of Eynon - - - 92

5. —— *Codicil—Acknowledgment of Signature.*] Where there is no formal attestation clause to a testamentary paper, and no affirmative evidence that at the time of execution the deceased's name was on the paper, the mere production of it to witnesses with a request that they will sign it as a paper, is not in itself sufficient to justify the Court in drawing the inference that it was already signed by the deceased. Fisher *v.* Popham: Brettell and Others intervening 246

6. —— *Position of Signature*—15 *Vict. c.* 24.] The deceased having obtained a form of will, lithographed on the first side of a sheet of foolscap paper, wrote her will on the second and third sides thereof, terminating near the bottom of the third side; the fourth side was blank. The form was not filled up except as to the appointment of executors. The deceased signed her name, in the presence of witnesses, at the foot of the lithographed form:—*Held*, that, as regards the position of the signature, the execution was valid as within the provisions of 15 Vict. c. 24. In the Goods of Wotton - - - - - 159

7. —— *Signature—Foot or End—Attestation.*] The will of the deceased was written on a lithographed form, and extended over the first and second sides of a sheet of foolscap paper. The form contained attestation clauses at the foot of the first and second sides of the paper. The deceased made a mark in the blank spaces left for the purpose in both such clauses. Two witnesses signed their names at the bottom of the first side only, and before the deceased made her mark in the attestation clause of the second side:—*Held*, that the only mark which could give validity to the will was on the second side, and that was not attested by the witnesses. In the Goods of Dilkes - - - - - - 164

8. ——*Testimonium and Attestation Clauses with Signature on a separate Paper attached to Instrument by String—Alterations unattested—Paper pasted over Legacies.*] The deceased signed his name and the witnesses attested such signature on a piece of paper upon which no dispositive part of the will was written. This paper was attached by string to the paper on which the will was written just opposite to the termination of the

EXECUTION OF WILL—*continued.*
writing. On the evidence of the witnesses that the papers, to the best of their belief, were in the same state when they signed them as they are now; it was held that the execution was valid.—Where a testator has pasted over a whole legacy a piece of paper on which at some time, about which the witnesses can give no information, he has written a new bequest, the Court will not order the upper paper to be removed, and will direct the probate to issue in blank as to that legacy; but if the testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the Court will consider it a case which comes under the principle of a dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper. In the Goods of Horsford. - - - - - - 211

9. —— *Will—Prepared for another Person—Executed by Mistake—Probate.*] The deceased, who resided with her sister, prepared two wills for their respective execution. The legacies in each, and the disposition of the residue were almost identical, and in either case a life interest was given to the survivor in the bulk of her sister's property. The deceased, in mistake, executed the will prepared for her sister.—The Court *held* that the deceased did not know and approve of the contents of the document she executed, and refused probate of it. In the Goods of Hunt. [250

10. —— *Witness's Name partly written—"Attest and subscribe."*] The deceased executed her will in the presence of two witnesses, one of whom signed his name thereto; but the other, after writing his Christian name, was unable, through feebleness, to complete his signature. Subsequently a third person was introduced, and the deceased made her mark in the presence of such person and the witness who had signed his name. The latter traced his signature over with a dry pen, and the former signed his name:—*Held*, that the execution was invalid in the latter case by reason that the witnesses did not both attest and subscribe the signature of the deceased; and in the former by reason that one witness had no intention, by writing his Christian name only, to subscribe the will. In the Goods of Maddock - - - - - - - 169

—— Alteration - - - - - 242
See Alteration of Will.

—— Presumption of state - - - 84
See Presumption of State of Will.

EXECUTOR—Appointment—Parol evidence 26
See Evidence to explain Will.

—— Bad character - - - - 48
See Executor Abroad.

—— Costs—Priority - - - 90
See Costs in Testamentary Suit.

—— Costs—Will pronounced against - 64
See Testamentary Capacity.

—— Renunciation - - - 113, 151
See Renunciation by Executor. 1, 2.

—— Tenor of Will - - - 157, 244
See Executor according to the Tenor. 1, 2, 3.

EXECUTOR ABROAD—*Will*—20 & 21 *Vict. c.* 77, *s.* 73—*Special Circumstances—Administration with Will annexed.*] The Court of Probate cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of the deceased, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit. In the Goods of Samson - 48

EXECUTOR ACCORDING TO THE TENOR—*Will*—20 & 21 *Vict. c.* 77, *s.* 73.] Testatrix, by her will, appointed her daughter, who is under age, sole executor and universal intromitter with her moveable means and estate, and certain persons trustees for the daughter until she is of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The Court refused to grant probate of the will to the trustees as executors according to the tenor thereof, but ordered that administration with the will annexed should issue to them under the 73rd section of the Probate Act, by reason that the testatrix had not appointed by her will an executor competent to take probate thereof. In the Goods of Stewart [244

2. —— *Will—Trustee.*] The deceased, in her will, appointed E. H. her sole trustee, and directed that he should be paid as an attorney the same as if he had not been a trustee. The only duties assigned to him were those of a trustee:—*Held*, that he was not an executor according to the tenor of the will. In the Goods of Lowry [157

3. —— *Will—Alterations dated prior to Execution of Will.*] In order to constitute one an executor according to the tenor of a will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in such will.—In the absence of any proof that alterations in a will were made before its execution, beyond the fact that they bear an earlier date than the will in the handwriting of the testator, such alterations will not be recognized by the Court or appear in the probate. In the Goods of Adamson [253

FOREIGN COURT—Will—Domicil - 4
See Will of Foreigner.

FOREIGNER—Will - - - - 4
See Will of Foreigner.

HEARING IN CAMERA—*Suit for Restitution of Conjugal Rights—Practice.*] In every matrimonial suit, which before the passing of the Divorce Act (20 & 21 Vict. c. 85), might have been determined in an Ecclesiastical Court, the Judge Ordinary may, if he considers the circumstances of the case to require it, direct that the hearing shall take place in private. A. *v.* A. - 230

HOLOGRAPH WILL—Soldier on service - 204
See Will of Soldier.

HUSBAND AND WIFE—Cruelty - 118, 121
See Cruelty of Husband. 1, 2.

HUSBAND AND WIFE—*continued.*
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INSANITY—Will—Capacity - - - 64
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JUDGMENT—Estoppel—Will - - 7
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—— Cruelty—Adultery - - 118, 121
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—— Cruelty—Separation deed - - 202
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JURISDICTION—Divorce Court—Charging order
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—— Plea to—Alimony - - - 259
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—— Probate Court—Will of realty - 177
See Will of Realty.

LEGITIMACY DECLARATION—21 & 22 *Vict. c.* 93—*Allegations relating to a Claim to a Baronetcy.*] The Legitimacy Declaration Act gives the Court no jurisdiction to investigate or decide upon a claim to a title of honour, and allegations in a petition, to the effect that by reason of the facts therein set out the petitioner was entitled to a baronetcy, were ordered to be struck out as irrelevant. Frederick *v.* Attorney General 196
—— Costs—Evidence - - - 270
See Declaration of Member of Family.
LIMITED ADMINISTRATION—*Widow and Next of Kin—Widow received her Share of Estate*—20 & 21 *Vict. c.* 77, *s.* 73.] The deceased having died in India, his property was administered by the Administrator-General there, who paid one moiety of the available funds to the widow, who was resident in India, and transmitted the other moiety to this country for distribution amongst the parties entitled thereto at the time of the deceased's death. The Court, under 20 & 21 Vict. c. 77, s. 73, granted administration of the goods of the deceased to one of such parties limited to the property transmitted to this country by the Administrator-General. In the Goods of Hughes - - - - - 140
LIS MOTA—Evidence—Declarations - 270
See Declaration of Member of Family.
LOST WILL—*Question of Revocation—Evidence—Admissibility of Declarations of Testator.* In order to rebut the presumption of revocation arising from a will which was in a testator's possession not being found after his death, evidence was produced of declarations by the testator shewing an intention to adhere to the will. The Court held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed; and therefore that a declaration by the testator that he had burnt his will was admissible, not as evidence of the fact of destruction, but as evidence of intention. Keen *v.* Keen - - - - - 105

MARRIED WOMAN—Will - - - 183
See Will of Married Woman.
—— Will—Costs - - - - 141
See Costs out of Estate.
MATRIMONIAL SUIT—Wife's costs - 132
See Costs of Wife.
MINOR—Administration—Nominee - 139
See Administration by Nominee of Children.
MISCONDUCT OF PETITIONER—*Suit for Dissolution of Marriage by the Husband—Petitioner guilty of a single Act of Adultery—Condonation*—20 & 21 *Vict. c.* 85, *s.* 31.] On one occasion subsequent to his marriage the petitioner had connection with a female with whom he had cohabited before marriage. The fact became known to the respondent shortly afterwards, and was by her forgiven, and her cohabitation with her husband was continued for some considerable time:—*Held*, that the condonation by the respondent was not a fact to justify the Court in exercising its discretion in favour of the petitioner, and therefore it dismissed the petition. McCord *v.* McCord - - - - - 237

NEW TRIAL—Conviction of witnesses for perjury - - - - - 88
See Conviction of Witnesses for Perjury.
NEW TRUSTEE—Variation of settlement—Divorce Court - - - - 226
See Settlement by Divorce Court.
NEXT OF KIN—Costs - - - 179
See Costs against Next of Kin.
—— Widow—Administration - - 50
See Administration to Widow.
NULLITY OF MARRIAGE—*Incapacity from Nervous Affection—No Inspection of Respondent—Decree Nisi.*] In a suit of nullity it appeared, from the husband's evidence, that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, and that, although he had cohabited with her for more than three years, the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband the

NULLITY OF MARRIAGE—*continued.*
Judge Ordinary made a decree nisi to annul the marriage under the provisions of the statute 36 Vict. c. 31. H. *v.* P. - - - 126

2. —— *Decree Nisi—Time to make Absolute—36 Vict. c. 31.*] The legislature having extended to suits for nullity of marriage the provisions of 23 & 24 Vict. c. 144, s. 7, whereby a decree nisi for divorce is not to be made absolute under six months unless the Court otherwise direct, the Judge Ordinary will not exercise his discretion to shorten the period in cases of nullity of marriage except under very special circumstances. M. *v.* B. [200

OMISSION OF PARAGRAPH FROM PROBATE—*Will—Words introduced per incuriam—Omission.*] The deceased by her will left a portion of her furniture and household effects to her daughter, and disposed of the residue of her property, appointing trustees and executors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will and testament, and in addition to a clause to the effect abovementioned, contained one revocatory of all former wills. This paper was executed by the deceased, but was not read over to or by her, and she was not aware that it contained such words of revocation:—*Held*, that as the words of revocation had been introduced per incuriam and without the instructions of the deceased, and their presence there was unknown to the deceased when she executed the will, they ought to be omitted from the probate. In the Goods of Oswald - 162

2. —— *Will—Words introduced not in the Instructions—Parol Evidence.*] Testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms: "the trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same, &c." The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator:—*Held*, that, however clearly an error can be established in a will, unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court of Probate cannot correct it either by the omission of words or by the insertion of other words. Harter *v.* Harter - - - 11

PAROL EVIDENCE—Will—Omission - 11
See Omission in Probate.
—— Will—Revocation - - - 94
See Revocation of Will. 5.

PEDIGREE—Declaration of family - 270
See Declaration of Member of Family.

PERJURY—Conviction of witness—New trial [88
See Conviction of Witness for Perjury.

PETITION — *Administration — Husband or Wife Survivor—Practice.*] A question whether a husband, who has not been heard of for many years, survived his wife, litigated between the next of kin of the husband and of the wife, may be decided either on a petition or declaration. Objection to either form of procedure is waived by taking any step in the cause. Peppercorne *v.* Gardner 149
—— Service—Prisoner - - - 233
See Substituted Service.

PLEA TO JURISDICTION—Alimony - 259
See Alimony. 3.

POWER IN WILL TO CARRY ON BUSINESS—*Will—Power to carry on Business—Debts incurred by Administratrix in so doing—Administration de bonis non—Creditor.*] The deceased by his will directed his executors and trustees (who, however, did not act) to permit his wife to receive the rents and annual profits of his estate, and to carry on his business of a draper for her natural life. She took administration with the will annexed, of the goods of the deceased, and, in carrying on the business, incurred debts to many persons, more especially to the plaintiff. She died intestate and insolvent, and the parties entitled to the reversion of the deceased's estate having been cited did not accept administration of the unadministered estate of the deceased:—*Held*, that, as the estate of the widow was primarily liable for the debts contracted by her in carrying on the business, the plaintiff must first take administration to her effects before he could be entitled to a grant of administration de bonis non of the estate of the deceased. Fairland *v.* Percy - - 217

PRACTICE—Alimony - - - 55
See Alimony.
—— Costs—Executor - - - 64
See Testamentary Capacity.
—— Costs—Priority of executor - - 90
See Costs in Testamentary Suit. 3.
—— Costs against next of kin - - 179
See Costs against Next of Kin.
—— Costs of wife - - - - 52
See Costs of Divorce Suit.
—— Costs of wife - - - - 132
See Costs of Wife.
—— Costs out of estate - - 23, 28, 90
See Costs in Testamentary Suit. 1, 2, 3.
—— Delay in petition - - - 193
See Delay.
—— Examination de bene esse - - 181
See Examination de bene esse.
—— Foreign will - - - - 4
See Will of Foreigner.
—— Hearing in camera - - - 230
See Hearing in Camera.
—— Intervention—Custody of children - 134
See Custody of Children.
—— New trial—Conviction of witness for perjury - - - - - 88
See Conviction of Witness for Perjury.
—— Petition or declaration - - - 149
See Petition.

PRACTICE—*continued.*
—— Plea to jurisdiction - - - 259
See Alimony. 3.
—— Respondent in person—Service - 233
See Substituted Service.
—— Time for decree - - - 200
See Nullity of Marriage.

PRESUMPTION—Will—State when executed [84
See Presumption of State of Will.

PRESUMPTION OF REVOCATION—Will - 105
See Lost Will.

PRESUMPTION OF STATE OF WILL—*Will—Sheet interpolated—Presumption.*] The will of the deceased had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the sixteenth sheet the testator had written a codicil, and on the eighteenth and last, a schedule of property, referred to in the will. On the death of the testator, it was found that the original fourth sheet had been removed and placed loose in his desk, and that the original seventeenth sheet had been used by the testator in substitution of the fourth. The several sheets were tied together with tape:—*Held*, that the legal presumption that papers bound together and constituting the will, as found at testator's death, were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case. Rees *v.* Rees - 84

PRISONER—Service of divorce petition - 233
See Substituted Service.

PROBATE—Citation to bring in—Estoppel 7
See Estoppel by Judgment.
—— Omission of words - - - 162
See Omission of Paragraph from Probate. 1, 2.
—— One of several documents - - 110
See Probate of Part of Will.
—— Scotch disposition - - - 45
See Probate of Scotch Disposition.
—— Two wills - - - - 153
See Probate of Two Wills.

PROBATE COURT JURISDICTION — Will of realty - - - - 177
See Will of Realty.

PROBATE OF PART OF WILL—*Will and Two Codicils in England—Other Codicils in India—Probate of First only—Power reserved to prove the other Codicils or authentic Copies thereof, when they arrive in this Country—Practice.*] Under special circumstances the Court will grant probate of certain papers forming part of the will of a deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers or authentic copies thereof when they arrive, and on an undertaking on his part that he will do so. In the Goods of Robarts - 110

PROBATE OF SCOTCH DISPOSITION—*Will—Scotch Disposition and Settlement—Probate.*] Testator executed a trust disposition and settlement, valid according to the law of Scotland, and applicable to the whole heritable and moveable estate which should belong to him at the time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together form the complete testamentary disposition of the testator. The deceased's domicil was English, but he had a freehold estate in Scotland. The Court granted probate of the will and trust disposition as together containing the will of the deceased. In the Goods of Donaldson - - - 45

PROBATE OF TWO WILLS—*Two Instruments called respectively "Last Will and Testament"—No Residuary Bequest in last.*] The deceased executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and she appointed her executrix. She subsequently executed another instrument, which purported to be her last will and testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, and made her whole and sole executrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue:—*Held*, that the two instruments ought to be admitted to probate as together containing the will of the deceased. In the Goods of Petchell - 153

QUEEN'S PROCTOR—Intervention—Collusion
See Costs of Wife. 2. [260

RECEIVER—Administration—General grant
See Administration to Receiver. [39

RENUNCIATION BY EXECUTOR—*Testamentary Suit—Executor—Retractation*—20 & 21 *Vict. c.* 77, *s.* 79.] It has never been decided that an executor who has filed a renunciation of his rights may not afterwards retract such renunciation, notwithstanding the terms of s. 79 of the Probate Act, 1857, but he certainly will not be permitted to do so, unless he can shew that such retractation will be for the benefit of the estate or of those interested under the deceased's will. In the Goods of Gill - - - - 113

2. —— *Will—Retractation*—20 & 21 *Vict. c.* 77, *s.* 79.] A testator having died insolvent, the executor of his will signed a renunciation of his right to probate, and such renunciation, together with the other papers to lead a grant to a creditor, were taken into the registry. A difficulty having arisen as to such grant, the papers were withdrawn, and an application made by the executor for probate:—*Held*, that a party may retract a renunciation at any time before it is filed and recorded in the registry. In the Goods of Robert Morant - - - - - 151

RESTITUTION OF CONJUGAL RIGHT—Practice
See Hearing in Camera. [230

RETRACTATION OF RENUNCIATION—Executor [113, 151
See Renunciation by Executor. 1, 2.

REVIVAL OF WILL—*Will—Codicil—Subsequent Will—Codicil referring to first Will by Date—Revival.*] The deceased executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R., dated May, 1866, in presence of, &c." :—*Held*, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871. In the Goods of Reynolds - 35

REVOCATION OF WILL—*Will destroyed by Testator when suffering from Delirium Tremens—Subsequent Recognition of the Act.*] The testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out: —*Held*, that the will was not revoked. Brunt *v.* Brunt - - - - - - 37

2. —— *Will—Codicil—Further Codicil confirming the Will only, and called the last and deliberate Will.*] The testator, by birth a British subject, but domiciled in Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will:—*Held*, that the Spanish codicils were not revoked by the last-mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it. In the Goods of De la Saussaye - - - - 42

3. —— *Dependent Revocation.*] The testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character:—*Held*, that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate. In the Goods of Gentry - 80

4. —— *Revocation, total, partial, or contingent—Dependent relative Revocation.*] The testatrix, having her will in her hand, dictated the alterations she desired to be made in the first part of it to a friend, who wrote them down. Testatrix, feeling unwell, desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum, together with the rest of the will, which contained the residuary clause and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so that these papers constituted a new will, and were not merely instructions for such a will:—*Held*, that it was a case of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained and the draft of the part which was destroyed. Dancer *v.* Crabb - - 89

5. —— *Words written on Erasure — Words erased not apparent—Dependent relative Revocation—Parol Evidence.*] The principle of dependent relative revocation applies to the case where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The Court will receive evidence to shew what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee. In the Goods of McCabe - 94

—— Will—Evidence - - - 105
See Lost Will.

—— Married woman - - - - 183
See Will of Married Woman.

—— Words of, omitted from probate - 162
See Omission of Paragraph from Probate.

—— Pasting over - - - - 211
See Execution of Will.

SCOTCH DISPOSITION—Probate - - 45
See Probate of Scotch Disposition.

SEPARATION DEED—*Petition for Dissolution of Marriage—Respondent's Prayer for Judicial Separation.*] The husband and wife lived apart, under a deed of separation, in which a trustee was appointed, a sufficient allowance was secured to the wife, and she had the custody of two children and access to the third. Subsequently the husband petitioned this Court for a dissolution of marriage, by reason of his wife's adultery. She denied the adultery, pleaded cruelty, and prayed for a judicial separation. The acts of cruelty alleged all took place previous to the separation of the parties. The jury found that the respondent had not been guilty of adultery and that the petitioner had been guilty of cruelty:—*Held*, that the respondent was entitled to a decree of judicial separation. Brown *v.* Brown and Shelton - - - 202

—— Alimony pendente lite - - 55
See Alimony.

—— Allowance - - - - 186
See Alimony pendente Lite.

SERVICE—Divorce petition—Prisoner - 233
See Substituted Service.

SERVICE OF CITATION—*Dissolution of Marriage—Personal Service of the Petition on Respondent—20 & 21 Vict. c. 85, s. 42.*] Where every reasonable effort has been made to trace the respondent for the purpose of effecting a personal service of

SERVICE OF CITATION—*continued.*
the citation and petition in a matrimonial suit, but without success, the Court will dispense with such personal service. Appleyard *v.* Appleyard - - - - - - - 257

SETTLEMENT BY DIVORCE COURT—*Dissolution of Marriage—Variation of Settlement—Appointment of new Trustees*—22 & 23 *Vict. c.* 61, *s.* 5.] The Judge Ordinary has no power, under 22 & 23 Vict. c. 61, s. 5, to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage, the dissolution of which it has decreed. Hope *v.* Hope and Erdody - - - - - - 226

SIGNATURE—Will - 159, 164, 166, 169, 172
See Execution of Will. 1, 2, 3, 4, 5.

—— Will—Separate sheet of paper - 211
See Execution of Will.

SOLDIER'S WILL—Alterations - - 204
See Will of Soldier.

STATUTES:

1 Vict. c. 26, s. 21 - - - - 212
See Alteration of Will.

1 & 2 Vict. c. 110, ss. 14, 18 - - 57
See Charging Order.

15 Vict. c. 24 - - - - 159
See Execution of Will.

20 & 21 Vict. c. 77, s. 73 - - - 140
See Limited Administration.

—— —— —— - - - - 48
See Executor Abroad.

—— —— —— - - - 207, 235
See Administration by Stranger.

—— —— —— - - - - 244
See Execution according to the Tenor.

—— —— s. 79 - - - 113, 151
See Renunciation by Executor.

20 & 21 Vict. c. 85, s. 35 - - - 134
See Custody of Children.

—— —— s. 42 - - - - 257
See Service of Citation.

21 & 22 Vict. c. 93 - - - - 196
See Legitimacy Declaration.

22 & 23 Vict. c. 61, s. 4 - - - 134
See Custody of Children.

—— —— s. 5 - - - - 226
See Settlement by Divorce Court.

23 & 24 Vict. c. 144, s. 7 - - - 136
See Variation of Decree.

29 Vict. c. 32, s. 3 - - - - 136
See Variation of Decree.

32 & 33 Vict. c. 68 - - - - 198
See Cross-examination as to Adultery.

36 Vict. c. 31 - - - 126, 200
See Nullity of Marriage. 1, 2.

STAY OF PROCEEDINGS—Wife's costs - 52
See Costs in Divorce Suit.

STOCK—Charging order—Divorce Court - 57
See Charging Order.

SUBSTITUTED SERVICE—*Matrimonial Suit—Respondent in Prison — Substituted Service—Practice.*] If the respondent be in prison, the Court will not be satisfied with substituted service of the petition and citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to the respondent. Bland *v.* Bland - - 233

SURVIVOR OF HUSBAND AND WIFE - 149
See Petition.

TESTAMENTARY CAPACITY — *Testamentary Suit—Delusions in Reference to the Conduct of Children—Will pronounced against—Executor's Costs—Practice.*] A man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children, but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. If such repulsion, amounting to a delusion as to character, is shewn to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, and the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will and the circumstances surrounding the execution of it.—Primâ facie, an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will be pronounced against. Boughton *v.* Knight - 64

TESTAMENTARY SUIT—Compromise—Costs 115
See Compromise of Testamentary Suit.

—— Costs - - - - 23, 28, 90
See Costs in Testamentary Suit. 1, 2, 3.

—— Costs—Next of kin - - - 179
See Costs against Next of Kin.

—— Costs out of estate - - - 141
See Costs out of Estate.

TRUST PROPERTY—Will—Administration 209
See Administration with Will annexed.

TRUSTEE—Administration - - - 168
See Administration by Trustee.

—— Executor—Tenor of will - - 157
See Executor according to the Tenor.

UNREASONABLE DELAY—Divorce 84, 193
See Delay. 1, 2.

VARIATION OF DECREE—*Dissolution of Marriage—Decree Nisi*—23 & 24 *Vict. c.* 144, *s.* 7—29 *Vict c.* 32, *s.* 3.] The Court having directed a decree nisi to issue for dissolution of marriage to be made absolute at the end of six months, under

VARIATION OF DECREE—*continued.*
special circumstances allowed such decree to be varied by the introduction of the word "three" instead of the word "six," and in its discretion reduced to three months the time fixed for making such decree absolute. FITZGERALD *v.* FITZGERALD - - - - - 136

WAIVER OF IRREGULARITY - - 149
See PETITION.

WIDOW—Administration - - - 50
See ADMINISTRATION TO WIDOW.

WILL—Administration—Minor children - 139
See ADMINISTRATION BY NOMINEE OF CHILDREN.

—— Administration—Person not interested [207, 235
See ADMINISTRATION BY STRANGER.

—— Administration—Trustee - - 108
See ADMINISTRATION BY TRUSTEE.

—— Administration with will annexed - 209
See ADMINISTRATION WITH WILL ANNEXED.

—— Alteration - - - 211, 253
See EXECUTION OF WILL.
EXECUTOR ACCORDING TO THE TENOR. 3.

—— Alteration—Attestation - - 242
See ALTERATION IN WILL.

—— Confirmation - - - - 42
See REVOCATION OF WILL. 2.

—— Execution - 159, 164, 166, 169, 172
See EXECUTION OF WILL. 1, 2, 3, 4, 5.

—— Execution—Acknowledgment - 1
See EXECUTION OF WILL. 1.

—— Execution—Acknowledgment of signature [346
See EXECUTION OF WILL.

—— Execution—Attestation - - 92
See EXECUTION OF WILL. 2.

—— Execution—Signature and attestation 311
See EXECUTION OF WILL.

—— Execution—Wrong will executed - 250
See EXECUTION OF WILL.

—— Executor—Parol evidence - - 26
See EVIDENCE TO EXPLAIN WILL.

—— Executor—Renunciation - 113, 151
See RENUNCIATION BY EXECUTOR. 1, 2.

—— Executor abroad - - - 48
See EXECUTOR ABROAD.

—— Executor according to the tenor 157, 244, [253
See EXECUTOR ACCORDING TO THE TENOR. 1, 2, 3.

—— Foreigner - - - - 4
See WILL OF FOREIGNER.

—— Limited administration - - 140
See LIMITED ADMINISTRATION.

—— Lost—Revocation - - - 105
See LOST WILL.

—— Married woman - - - - 183
See WILL OF MARRIED WOMAN.

—— Power to carry on business - - 217
See POWER IN WILL TO CARRY ON BUSINESS.

WILL—*continued.*

—— Presumption of state when executed - 84
See PRESUMPTION OF STATE OF WILL.

—— Probate—Omission of clause - 11, 162
See OMISSION OF PARAGRAPH FROM PROBATE. 1, 2.

—— Probate—One of several documents - 110
See PROBATE OF PART OF WILL.

—— Probate—Scotch disposition - - 45
See PROBATE OF SCOTCH DISPOSITION.

—— Realty - - - - - 177
See WILL OF REALTY.

—— Revival - - - - - 35
See REVIVAL OF WILL.

—— Revocation - - 37, 42, 80, 89, 94
See REVOCATION OF WILL. 1, 2, 3, 4, 5.

—— Revocation—Pasting over - - 211
See EXECUTION OF WILL. 9.

—— Soldier on service - - - 204
See WILL OF SOLDIER.

—— Testamentary capacity - - - 64
See TESTAMENTARY CAPACITY.

—— Two documents - - - - 153
See PROBATE OF TWO WILLS.

—— Unsuccessful opposition—Costs 23, 28
See COSTS IN TESTAMENTARY SUIT. 1, 2.

WILL ANNEXED—Administration—Trustee 108
See ADMINISTRATION BY TRUSTEE.

WILL OF FOREIGNER—*Testamentary Suit—Foreign Domicil—Probate issued under Law of Domicil, and unrevoked—Pleading—Practice.*] If a will of the deceased has been formally recognized and acted upon by the Court of competent jurisdiction in the country of his domicil at the time of death, and remains unquestioned in that country, the Court of Probate will not allow the validity of such will to be litigated here. MILLER *v.* JAMES - - - - - 4

WILL OF MARRIED WOMAN—*Made under a Power given to her by her Settlement—A subsequent Will referring to such Power, and containing general revocatory Words—Revocation.*] The testatrix, a married woman, executed a will, in which, referring to a power to that effect given to her under her marriage settlement, she disposed of all her property in favour of her husband. She subsequently made a second will, in which she referred to the same power, and bequeathed the greater portion of the property affected by the settlement to certain persons. This will contained works revoking all former wills made by the testatrix:—*Held*, that the first will was revoked thereby. IN THE GOODS OF SARAH EUSTACE 183

—— Costs of suit - - - - 141
See COSTS OUT OF ESTATE.

WILL OF REALTY ONLY—*Order to pay Debts—Legacies out of Proceeds of Sale—Jurisdiction.*] By his will the deceased ordered his debts to be paid and a portion of his real estate to be sold and out of the proceeds thereof certain legacies to be paid. All his other tenements or hereditaments whatsoever, in remainder or expectancy, he gave and devised unto his son and daughters in equal proportion. No direct reference was made therein to personal estate:—*Held*, that the Court

WILL OF REALTY ONLY—*continued.*
of Probate has no jurisdiction to grant probate of such a will. In the Goods of John Bootle 177

WILL OF SOLDIER—*Holograph Will—Testator an Officer in actual military Service—Alterations—Presumption.*] Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst as a soldier he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate. In the Goods of Farquharson Tweedale [204

WITNESS—Conviction of perjury—New trial [88
See Conviction of Witness for Perjury.

—— Cross-examination—Adultery - 198
See Cross-examination as to Adultery.

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See Examination de bene esse.

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

UL 11 NOV 1977